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2 **UNITED STATES DISTRICT COURT**
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4 **DISTRICT OF OREGON**
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6 **PORTLAND DIVISION**
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8 AUDUBON SOCIETY OF PORTLAND)
9 and WILLAMETTE RIVERKEEPER,)
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Plaintiffs,) **No. 03:11-cv-00494-HU**
vs.)
NATIONAL MARINE FISHERIES)
SERVICE and U.S. ARMY CORPS)
OF ENGINEERS,)
Defendants.)
PORT OF PORTLAND,)
Intervenor.)

**ORDER ON PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION**

Daniel J. Rohlf
Lewis & Clark Law School
10015 S.W. Terwilliger Boulevard
Portland, OR 97219

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Attorney for Plaintiffs
Kevin William McArdle
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
P.O. Box 7369
Washington, DC 20044-7369

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23)
24)
25)
26)
27)
28)

Attorney for Defendants
Beverly C. Pearman
Peter D. Sax
Stoel Rives LLP
900 S.W. Fifth Avenue
Suite 2600
Portland, OR 97204

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1 - ORDER ON MOTION FOR PRELIMINARY INJUNCTION

1 HUBEL, Magistrate Judge:

2 This matter is before the court on the plaintiffs' Motion for
 3 Preliminary Injunction and supporting documents, Dkt. ##5-8. The
 4 defendants have filed a response in opposition to the motion, Dkt.
 5 ##19-22; the Intervenor has filed an opposition to the motion, Dkt.
 6 ##14-18; and the plaintiffs have filed a reply, Dkt. ##23, 24 & 28.
 7 The court heard oral argument on the motion on July 25, 2011, and
 8 took the motion under advisement at that time. Having considered
 9 all of the parties' briefs and declarations, and the arguments of
 10 counsel, I **deny** the motion.

11

12 ***I. INTRODUCTION***

13 On April 22, 2011, the plaintiffs Audubon Society of Portland
 14 and Willamette Riverkeeper filed a Complaint for Declaratory and
 15 Injunctive Relief against the defendants National Marine Fisheries
 16 Service ("NMFS")¹ and U.S. Army Corps of Engineers ("the Corps").
 17 Dkt. #1. The impetus for the filing of the Complaint is dredging
 18 activity scheduled to take place between river miles 2.1 and 2.4 on
 19 the Lower Willamette River between July 1 and October 31, 2011 (the
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24 ¹Although the parties refer to this defendant as the "National
 25 Marine Fisheries Service (NMFS)," the agency, which is part of the
 26 National Oceanic and Atmospheric Administration, is properly called
 27 the "NOAA Fisheries Service." See <http://www.nmfs.noaa.gov/>; see
 28 also *Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, Nos. CV
 01-640-RE, CV 05-23-RE, 2005 WL 1278878, at *1 n.1.

2 Nevertheless, because the parties refer to the agency as
 2 "NMFS," the court will use that designation in this opinion to
 2 avoid confusion.

1 "in-water work window" for that portion of the river).² The
 2 dredging action proposed by the Corps would remove some 75,000
 3 cubic yards of sediment that has built up in the "Post Office Bar"
 4 area on the east side of the Willamette River, to return the
 5 channel in this location to its intended depth and width. The
 6 removed sediment would be transported by barge for disposal on West
 7 Hayden Island. According to the plaintiffs, the dredges "would
 8 work up to 7 days a week and 24 hours a day during one month of the
 9 in-water work window." Dkt. #1, ¶ 33.

10 On May 13, 2010, NMFS issued a biological opinion (the "BiOp")
 11 on the proposed dredging. See Dkt. #8, Jolliffe Decl., Ex. 2. In
 12 the BiOp, NMFS concluded the proposed dredging action was not
 13 likely to jeopardize the continued existence of several species of
 14 salmon and steelhead currently listed as threatened species, or to
 15 damage their critical habitat. These species of fish,
 16 characterized by the plaintiffs as "evolutionarily significant
 17 units (ESUs)," include Upper Willamette River Chinook salmon
 18 (*Oncorhynchus tshawytscha*), Lower Columbia River Chinook salmon,
 19 Lower Columbia River steelhead (*O. mykiss*), Upper Willamette River
 20 steelhead, and Lower Columbia River coho salmon (*O. Kisutch*)
 21 (collectively, the "Pacific salmonids" or the "listed species").
 22 *Id.*, cover letter; Dkt. #1, ¶ 2.

23 In the plaintiffs' Complaint, they allege the Corps has a duty
 24 to comply with the Endangered Species Act, 16 U.S.C. § 1531, et
 25 seq. ("ESA"), prior to authorizing any dredging activity that may
 26

27 ²"[T]he Corps has agreed not to commence any in-water work
 28 prior to the issuance of the Court's ruling on Plaintiffs' motion
 or August 1, 2011, whichever occurs first." Dkt. #4, p. 2.

1 affect "listed species or designated critical habitat." Dkt. #1,
2 ¶ 11. The plaintiffs allege the Corps violated the ESA and the
3 Administrative Procedures Act, 5 U.S.C. § 701, *et seq.* ("APA"), "by
4 failing to ensure that its approval of Post Office Bar dredging is
5 not likely to jeopardize the continued existence of listed species
6 or destroy or adversely modify designated critical habitat."
7 Dkt. #1, ¶ 3.

8 The plaintiffs further allege that NMFS is "responsible for
9 the lawful administration of the ESA with respect to anadromous
10 fish, including those at issue in this case." Dkt. #1, ¶ 10. The
11 plaintiffs claim the BiOp issued by NMFS is "illegal," and NMFS has
12 violated the ESA and APA by issuing the illegal BiOp. *Id.*

13 For these alleged violations, the plaintiffs seek the
14 following relief:

15 [T]hat the Court declare the Corps has failed
16 to ensure that its approval of the Post Office
17 Bar dredge project BiOp avoids jeopardy to
18 listed ESUs and avoids destruction or adverse
19 modification of designated critical habitat;
20 hold unlawful and set aside NMFS'[s] BiOp for
21 this project and order NMFS to rescind the
22 BiOp; order the Army Corps to reinstitute
23 formal consultation with NMFS under Section 7
24 of the ESA; require NMFS to issue a valid BiOp
25 for the Post Office Bar dredge project; and
26 enjoin any dredging activity at Post Office
27 Bar pending the Corps' and NMFS'[s] full com-
28 pliance with the ESA.

Dkt. #1, ¶ 4.

The plaintiffs have filed a motion for preliminary injunction
to prevent the dredging action from going forward, and to prevent
NMFS from authorizing any incidental taking of the Pacific
salmonids, until the court has ruled on the merits of the
plaintiffs' Complaint. Dkt. #5.

1 **II. STATUTORY AND REGULATORY FRAMEWORK**

2 The ESA was enacted in 1973 to conserve endangered species and
3 the ecosystems upon which they depend. 16 U.S.C. § 1531(b) (noting
4 "the United States has pledged itself as a sovereign state in
5 the international community to conserve to the extent practicable
6 the various species of fish or wildlife and plants facing
7 extinction"). The ESA requires "all Federal departments and
8 agencies" to use "*all methods and procedures which are necessary to*
9 *bring any endangered species or threatened species* to the point at
10 which the measures provided pursuant to [the ESA] are no longer
11 necessary." 16 U.S.C. § 1531(c); *Tennessee Valley Authority v.*
12 *Hill*, 437 U.S. 153, 180, 98 S. Ct. 2279, 2295, 57 L. Ed. 2d 117
13 (1978) (emphasis in original). The Supreme Court observed that
14 Congress's "plain intent" in enacting the ESA "was to halt and
15 reverse the trend towards species extinction, whatever the cost.
16 This is reflected . . . in literally every section of the statute."
17 *Id.*, 437 U.S. at 184, 98 S. Ct. at 2297. The Supreme Court has
18 observed that the mandates of the ESA are to be afforded the
19 highest priority by federal agencies. *Id.*, 437 U.S. at 185, 98 S.
20 Ct. at 2297 ("[T]he legislative history undergirding § 7 reveals an
21 explicit congressional decision to require agencies to afford first
22 priority to the declared national policy of saving endangered
23 species.").

24 Pursuant to section 7 of the ESA, in any non-exempt action
25 where there is discretionary federal involvement or control, the
26 involved federal agencies are required to consult with "the Secre-
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28 / / /

tary”³ to ensure that the agency action “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. . . us[ing] the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.03. The term “[j]eopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. In using the “best scientific and commercial data available,” the agency is prohibited “from disregarding available scientific evidence that is in some way better than the evidence [it] relies on,” and it “cannot ignore available biological information.” *Kern County Farm Bur. v. Allen*, 450 F.3d 1072, 1080-81 (9th Cir. 2006) (internal quotation marks, citations omitted).

Judge James A. Redden of this court explained the requirements of this agency “consultation” in *National Wildlife Federation v. NMFS*, Nos. 01-cv-640, 05-cv-23, 2005 WL 1278878 (D. Or. May 26, 2005), *aff’d* 524 F.3d 917 (9th Cir. 2008) (“*NWF I*”):

/ / /

³Under the ESA, the term “Secretary” may refer to the Secretary of the Interior, the Secretary of Commerce, or sometimes the Secretary of Agriculture, depending on which program or proposed action is involved. 16 U.S.C. § 1532(15). NOAA and NMFS are subagencies of the United States Department of Commerce, and the Secretary of Commerce is responsible for overseeing their administration of the ESA with regard to the anadromous salmonids at issue in this case. See *id.*; note 1, *supra*; 50 C.F.R. § 402.01(b).

1 During a section 7 consultation, the
 2 consulting agency must “[e]valuate the effects
 3 of the action and cumulative effects on the
 4 listed species or critical habitat.” 50
 5 C.F.R. § 402.14(g)(3). The agency must
 6 “[f]ormulate its biological opinion as to
 whether the action, taken together with
 cumulative effects, is likely to jeopardize
 the continued existence of listed species or
 result in the destruction or adverse modifi-
 cation of critical habitat.” *Id.*

7 “Cumulative effects” are “those effects
 8 of future State or private activities, not
 9 involving Federal activities, that are
 reasonably certain to occur within the action
 area of the Federal action subject to
 10 consultation.” 50 C.F.R. § 402.02. “Effects
 11 of the action” are “the direct and indirect
 12 effects of an action on the species or
 critical habitat, together with the effects of
 other activities that are interrelated or
 interdependent with that action, that will be
 added to the environmental baseline.” [*Id.*]

13 The environmental baseline “includes all
 14 past and present impacts [on listed species
 15 and their critical habitat] of all Federal,
 State, private, and other human activities in
 16 the action area, the anticipated impacts of
 17 all proposed Federal projects in the action
 18 area that have already undergone formal or
 early section 7 consultation, and the impact
 of State or private actions which are
 contemporaneous with the consultation in
 process.” [*Id.*]

19 *NWF I*, 2005 WL 1278878, at *6.

20 Judge Redden further explained that if the biological opinion,
 21 or “BiOp,” required by section 7 concludes that a proposed agency
 22 action “will jeopardize a listed species, the opinion must include
 23 the reasonable and prudent alternatives to the agency’s action
 24 plans.” *NWF I*, 2005 WL 1278878, at *5.

25 A biological opinion “should address both
 26 the jeopardy and critical habitat prongs of
 27 Section 7 [of the ESA], by considering the
 28 current status of the species, the environ-
 mental baseline, the effects of the proposed
 action, and the cumulative effects of the

1 proposed action." *Gifford Pinchot Task Force
2 v. U.S. Fish & Wildlife Service*, 378 F.3d
3 1059, 1063 (9th Cir. 2004) (citing 50 C.F.R.
§ 402.14(g)(2)-(3)).

4 *NWF I*, 2005 WL 1278878, at *6. "Reasonable and prudent
5 alternatives refer to alternative actions identified during formal
6 consultation . . . that [are] economically and technologically
7 feasible, and that the [consulting agency] believes would avoid the
8 likelihood of jeopardizing the continued existence of listed
9 species or resulting in the destruction or adverse modification of
10 critical habitat." 50 C.F.R. § 402.2.

11 The "jeopardy analysis" the BiOp is required to address
12 "include[s] viewing the proposed action against 'the aggregate
13 effects of everything that has led to the species' current status,
14 and, for non-Federal activities, those things likely to affect the
15 species in the future.'" *Id.* (quoting *Endangered Species
16 Consultation Handbook - Procedures for Conducting Consultation and
17 Conference Activities Under Section 7 of the Endangered Species
18 Act*, at 4-35 (1998) (the "Consultation Handbook"). The
19 Consultation Handbook notes that with certain exceptions not
20 relevant here,

21 "[A] jeopardy opinion is rendered when the
22 total of the species' status, environmental
23 baseline, effects of the proposed action, and
24 cumulative effects lead to the conclusion that
the proposed action is likely to jeopardize
the continued existence of the entire species,
subspecies, or vertebrate population as
listed."

25
26 *Id.* (quoting the Consultation Handbook at 4-36). In other words,
27 a jeopardy opinion is warranted when agency actions are likely to
28 jeopardize an entire listed species or an entire critical habitat.

1 Section 9 of the ESA makes it unlawful to "take" any
2 endangered species of fish or wildlife except under certain
3 circumstances. 16 U.S.C. § 1538(a)(1)(B). To "take" a species
4 means "to harass, harm, pursue, hunt, shoot, wound, kill, trap,
5 capture, or collect, or to attempt to engage in any such conduct."
6 16 U.S.C. § 1532(19). A "taking" may be permitted if it "is
7 incidental to, and not the purpose of, the carrying out of an
8 otherwise lawful activity," but only after the applicant for such
9 a permit submits a conservation plan that is approved by the
10 Secretary. 16 U.S.C. § 1539(a)(2)(A).

11 When a proposed taking is by a federal agency, the Secretary
12 may allow an "incidental taking" if, after consultation with the
13 federal agency, the Secretary concludes that the proposed agency
14 action either will not jeopardize the continued existence of any
15 endangered or threatened species or result in the destruction or
16 adverse modification of the habitat of such species (collectively,
17 the "adverse impact"), or that the agency action "offers reasonable
18 and prudent alternatives which the Secretary believes would not
19 [cause the adverse impact]; and that "the taking of an endangered
20 species or a threatened species incidental to the agency action
21 will not [result in the adverse impact]." 16 U.S.C. § 1536(a)(2)
22 & (b)(4). An Incidental Take Statement ("ITS") issued by the
23 Secretary is a written statement that:

- 24 (i) specifies the impact of such incidental taking
25 on the species,
- 26 (ii) specifies those reasonable and prudent mea-
27 sures that the Secretary considers necessary
28 or appropriate to minimize such impact,
- 29 (iii) in the case of marine mammals, specifies those
30 measure that are necessary to comply with

1 section 1371(a)(5) of [title 16 USC] with
 2 regard to such taking, and

3 (iv) sets forth the terms and conditions (includ-
 4 ing, but not limited to, reporting require-
 5 ments) that must be complied with by the
 Federal agency or applicant (if any), or both,
 to implement the measures specified under
 clauses (ii) and (iii).

6 16 U.S.C. § 1536(b)(4). The ITS "functions as a safe harbor
 7 provision immunizing persons from [ESA] liability and penalties for
 8 takings committed during activities that are otherwise lawful and
 9 in compliance with its terms and conditions." *Arizona Cattle
 10 Growers' Ass'n v. U.S. Fish & Wildlife, B.L.M.*, 273 F.3d 1229, 1239
 11 (9th Cir. 2001) (citing 16 U.S.C. § 1536(o)).

12 The Ninth Circuit has noted that generally, an ITS establishes
 13 "an 'trigger' that, when reached, results in an unacceptable level
 14 of incidental take, invalidating the safe harbor provision, and
 15 requiring the parties to re-initiate consultation. Ideally, this
 16 'trigger' should be a specific number." *Arizona Cattle Growers'
 17 Ass'n*, 273 F.3d at 1249 (citing cases where the ITS specified a
 18 specific number; e.g., *Fund for Animals, Inc. v. Rice*, 85 F.3d 535
 19 (11th Cir. 1996) "(municipal landfill may take fifty-two snakes
 20 during construction and an additional two snakes per year
 21 thereafter)"). However, the court further noted that although
 22 "Congress indicated its preference for a numerical value, it
 23 anticipated situations in which impact could not be contemplated in
 24 terms of a precise number." *Id.*, 273 F.3d at 1250 (citations
 25 omitted). A numerical limit is not an absolute requirement, and
 26 the court has upheld ITSSs "that used a combination of numbers and
 27 estimates." *Id.*, 273 F.3d at 1249 (citing cases). Ecological
 28 conditions may be used "as a surrogate for defining the amount or

1 extent of incidental take . . . so long as these conditions are
2 linked to the take of the protected species." *Id.*, 273 F.3d at
3 1250 (internal quotation marks omitted). The court found this use
4 of a "surrogate" to be consistent with the provisions of the
5 Consultation Handbook:

6 "When preparing an incidental take statement, a specific number (for some species, expressed
7 as an amount or extent, e.g., all turtle nests not found and moved by the approved relocation
8 technique) or level of disturbance to habitat must be described. Take can be expressed also
9 as a change in habitat characteristics affecting the species (e.g., for an aquatic
10 species, changes in water temperature or chemistry, flows, or sediment loads) where data or information exists which links such
11 changes to the take of the listed species. In some situations, the species itself or the effect on the species may be difficult to detect. However, some detectable measure of effect should be provided. . . . [I]f a sufficient causal link is demonstrated (i.e., the number of burrows affected or a quantitative loss of cover, food, water quality, or symbionts), then this can establish a measure of the impact on the species or its habitat and provide the yardstick for reinitiation."

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18 *Id.* (quoting the Consultation Handbook at 4-47 to 4-48). The court explained that "[b]y 'causal link' we do not mean that the [agency] must demonstrate a specific number of takings; only that it must establish a link between the activity and the taking of species before setting forth specific conditions." *Id.*

23 This statutory and regulatory framework provides the foundation upon which the parties base their arguments.

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1 ***III. HISTORICAL BACKGROUND***

2 As background for the reason the ESUs in this case are facing
 3 extinction, the plaintiffs set forth the following history which
 4 has not been challenged by the defendants:

5 The Willamette River and the habitat it
 6 provides for threatened salmon and steelhead
 7 are fundamentally degraded and altered from
 8 historic conditions. Since the 1970s,
 9 development began to strip away the riparian
 10 forests surrounding the river, resulting in
 11 large functional losses to the river's com-
 12 plexity and productivity and reducing the
 13 amount of habitat crucial for salmon and
 14 steelhead. Once highly braided and complex,
 15 the Willamette River system was also drama-
 16 tically simplified through activities such as
 17 channelization and the placement of bank
 18 stabilizing "revetments."⁴ The river banks
 19 are now lined with more than 96 miles of
 20 revetments, about half of which the Corps con-
 21 structed. These activities and the resulting
 22 impacts reduced available salmonid rearing
 23 habitat by as much as 75%. Moreover, thirty-
 24 seven dams in the basin now block salmonid
 25 access to more than 435 miles of important
 26 stream and river spawning habitat in the
 27 Willamette Basin, and altering temperature
 28 regimes in the Willamette River and its tribu-
 29 taries. Finally, while human civilization has
 30 advanced in the region, water quality, salmon
 31 and steelhead and their habitat have suffered
 32 further due to agriculture, urbanization,
 33 mining, and timber harvest; adverse impacts
 34 from the river dredging and associated indus-
 35 trial activities resulted in additional
 36 additive harm.

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41 ⁴"Revetments" are "[f]ortified riverbanks intended to keep the
 42 river from meandering." Dkt. #8, Jolliffe Decl., Ex. 4, Executive
 43 Summary of 2008 Willamette Project Biological Opinion, at p. 4 n.1.

1 Dkt. #6, pp. 6-7; see Dkt. #8, Jolliffe Decl.⁵, Ex. 5, a Corps
 2 summary of NMFS's July 11, 2008, BiOp, entitled "Supporting fish
 3 recovery in the Willamette Valley" (May 2010).

4 The plaintiffs note that NMFS issued a BiOp on February 23,
 5 2004, that examined "all basins in Oregon with anadromous fish use
 6 . . . or designated critical habitat." Dkt. #6, p. 7 (citing the
 7 Feb. 23, 2004, BiOp (the "2004 BiOp") at 6, Dkt. #28, Ex. 1, p. 6).
 8 The plaintiffs point to the following findings NMFS made in the
 9 2004 BiOp:

10 [N]ot all of the biological requirements of
 11 the listed and proposed species for freshwater
 12 habitat in general, water quality in particu-
 13 lar, are being met under the environmental
 14 baseline in many streams and watersheds occu-
 15 pied by listed salmon and steelhead in Oregon.
 16 Their status is such that there must be a
 17 significant improvement[] in the environmental
 18 conditions they experience, over those
 19 currently available under the environmental
 20 baseline, to meet the biological requirements
 21 for survival and recovery of these species.

22 ⁵Michael Jolliffe is a recent graduate of Lewis & Clark Law
 23 School, where he "worked with the Pacific Environmental Advocacy
 24 Center, the law school's environmental law clinic," where the
 25 majority of his work was "on cases related to protection and
 26 conservation of salmon and steelhead in the Columbia River
 27 Basin[.]" *Id.*, ¶ 2.

28 In the present case, Jolliffe was asked to assess the extent
 1 to which NMFS, in its consideration of whether a proposed agency
 2 action on the Willamette and lower Columbia Rivers will adversely
 3 impact the ESUs and their critical habitat, "considers impacts on
 4 the listed species and designated critical habitat stemming from
 5 previous federal agency actions affecting these same ESUs and
 6 critical habitat." *Id.*, ¶ 5. In making his assessment, Jolliffe
 7 compiled a list of relevant NMFS BiOps issued since January 1,
 8 2005, and he considered each of them in detail, summarizing his
 9 findings in his Declaration, Dkt. #8.

10 The defendants do not challenge Jolliffe's representations
 11 regarding the previous BiOps. To the extent Jolliffe merely sets
 12 forth the results of his research, and does not attempt to offer
 13 expert opinion regarding scientific matters, the court accepts his
 14 factual representations as true for purposes of the plaintiffs'
 15 motion for preliminary injunction.

1 Any further degradation of these conditions
2 would significantly reduce the likelihood of
3 survival and recovery of these species due to
status of the environmental baseline.

4 Dkt. #28, Ex. 1, p. 24. Notably, however, the project considered
5 in the 2004 BiOp was for a much larger and more diverse area than
6 the Post Office Bar dredging project, and it concluded there would
7 be improvements to the entire project area over a period of years.

8 The plaintiffs conducted a comprehensive search and compiled
9 a listing of all BiOps issued by NMFS "that consider projects
10 likely to adversely affect ESUs in the Willamette Basin and lower
11 Columbia River" between January 1, 2005, and the May 13, 2010, BiOp
12 at issue in this case. Dkt. #8, Decl. of Michael Jolliffe, ¶ 5 &
13 Ex. 3. The listing compiled by the plaintiffs includes 151 NMFS
14 BiOps in which NMFS "assessed adverse impacts on upper Willamette
15 chinook and steelhead . . . [and in some instances] also assessed
16 impacts on threatened lower Columbia steelhead, chinook and coho."
17 *Id.*, ¶ 7 & Ex. 3. According to Mr. Jolliffe, the adverse impacts
18 found by NMFS in these BiOps "included further losses of riparian
19 vegetation and increases in turbidity; increased release of
20 chemical contaminates, adverse effects on the food base, and
21 increased predation rates; restrictions of fish passage; and
22 adverse effects on juvenile salmonids in the project area." *Id.*

23 The plaintiffs assert that of these 151 BiOps, there was only
24 one, a July 11, 2008, BiOp (the "2008 Jeopardy BiOp"), in which
25 NMFS made a finding of jeopardy. *Id.*; see *id.*, Ex. 4, "Executive
26 Summary [of the] 2008 Willamette Project Biological Opinion,"
27 issued by NMFS on July 11, 2008. The BiOp specified that "the
28 action area for purposes of the consultation includes the entire

1 Willamette River downstream from the Corps' 13 Willamette Project
 2 dams, as well as 20 miles of the Clackamas and Molalla Rivers
 3 above their confluence with the Willamette." Dkt. #8, Jolliffe
 4 Decl., ¶ 7 & Ex. 6.

5 In an introduction to its Executive Summary of the 2008
 6 Jeopardy BiOp, NMFS described its findings and the action taken as
 7 a result of those findings as follows:

8 The National Marine Fisheries Services
 9 (NMFS) completed a consultation with the U.S.
 10 Army Corps of Engineers, Bonneville Power
 11 Administration, and the Bureau of Reclamation
 12 (Action Agencies) on July 11, 2008, on the
 13 impact of the Willamette River Basin Project
 14 on species listed for protection under the
 15 Endangered Species Act. NMFS found that the
 16 Action Agencies' Proposed Action alone was not
 17 sufficient to avoid jeopardy or adverse modi-
 18 fication of critical habitat for two species:
 19 Upper Willamette River chinook salmon and the
 20 Upper Willamette River steelhead, and would
 21 destroy or adversely modify their critical
 22 habitat.

23 As a result, NMFS provided additional
 24 measures to mitigate for the projects'
 25 effects. These measures include fish passage
 26 at three dams, temperature control downstream
 27 of another dam, changes in downstream flows,
 28 screening of irrigation diversions, improved
 hatchery practices and facilities and habitat
 improvement projects. NMFS concluded that
 with the additional measures and timelines,
 combined with the Proposed Action, the
 Willamette Project could be operated and
 maintained without threatening the continued
 existence of the two Upper Willamette River
 salmonid species or destroying their critical
 habitat. NMFS'[s] decision means that the
 species should survive, with an adequate
 potential for the species' recovery.

This summary of NMFS'[s] Willamette River
 Project biological Opinion captures major
 elements of the Action Agencies' Proposed
 Action, NMFS analysis, and the resulting
 "reasonable and prudent alternative" actions.
 The Biological Opinion, issued by NMFS on
 July 11, 2008, contains detailed analyses
 undertaken in making its determination.

1 *Id.*, Ex. 4, p. 3.

2 According to the plaintiffs, the “reasonable and prudent
 3 alternative” (“RPA”) specified by NMFS “will take many years and
 4 millions of dollars to fully implement.”⁶ Dkt. #6, p. 9 (citing
 5 Dkt. #8, Jolliffe Decl., ¶ 7. In addition, the 2008 Jeopardy BiOp
 6 established “a detailed organizational structure” to oversee
 7 implementation of the RPA, with the Corps and NMFS being “part of
 8 each element of this structure.” *Id.*; see Dkt. #8, Jolliffe Decl.,
 9 Ex. 7 (setting forth a diagram of the organizational structure).

10 Jolliffe’s review of NMFS BiOps revealed thirty-three BiOps
 11 issued in connection with Willamette River projects between the
 12 2008 Jeopardy BiOp and the Post Office Bar BiOp at issue in this
 13 case. Dkt. #8, Jolliffe Decl., ¶ 8. According to Jolliffe, none
 14 of those BiOps included any assessment or consideration of whether
 15 the RPA is being or has been implemented, and if so, to what
 16 extent, nor did NMFS consider “the additive impacts of previously
 17 authorized federal projects on listed ESUs and their critical
 18 habitat in assessing whether the proposal under consideration was
 19 likely to jeopardize listed ESUs or destroy or adversely modify
 20 designated critical habitat.” *Id.*, ¶¶ 9 & 10; Dkt. #6, p. 9.

21 In his review of the thirty-three BiOps issued since July 11,
 22 2008, Jolliffe found that NMFS had used very similar or even
 23 identical language to describe the status of affected ESUs.
 24 According to Jolliffe, NMFS repeatedly quoted from a 2007 study

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 26 ⁶The plaintiffs state the BiOp for the Corps’ operation of the
 27 Willamette Project dam system was issued on May 11, 2008, rather
 28 than July 11, 2008. This appears to be an error, as the Executive
 Summary itself specifies the date of the BiOp as July 11, 2008.
 See Dkt. #8, Jolliffe Decl., ¶ 7 & Ex. 4, p. 3.

1 that concluded “[n]umbers of spring chinook salmon in the
2 Willamette River basin are extremely depressed.” *Id.*, ¶ 10
3 (citation omitted). Jolliffe states the language in the Post
4 Office Bar BiOp that discusses the status of Upper Willamette River
5 chinook salmon “is the same as it was in the 33 BiOps that preceded
6 it, with no mention of how the additive impacts of the federal
7 projects evaluated in those previous projects collectively affected
8 the status of [the] chinook and their critical habitat, for better
9 or worse.” *Id.* The narrative language indicates the chinook
10 salmon have “a high risk of extinction, and . . . their critical
11 habitat [is] severely degraded.” *Id.* However, the BiOp does not
12 “include any measurement of the additive impacts of projects for
13 which NMFS had previously issued biological opinions [or incidental
14 take statements] for federal projects that affected the same
15 species.” *Id.*

16 Jolliffe further states that in none of the thirty-three BiOps
17 since 2008, has NMFS “made any effort to assess incidental take it
18 has previously authorized and either quantified numerically or
19 estimated using a surrogate, in assessing whether additional take
20 would jeopardize the continued existence of listed ESUs[.]” *Id.*,
21 ¶ 11. According to Jolliffe, the most recent quantitative data
22 cited in the thirty-three BiOps dealing with population numbers of
23 the ESUs at issue is from 2007; there is no scientific quantitative
24 data cited relating to population numbers of the ESUs since the
25 2008 Jeopardy BiOp was issued. *Id.*, ¶ 12.

26 Turning to the proposed action at issue here, the parties
27 agree that sediment has built up on the east side of the lower
28 Willamette River at the Post Office Bar. The Corps proposes to

1 dredge the river to remove about 75,000 cubic yards of sediment.
 2 In the defendants' brief, they describe the proposed dredging
 3 action in some detail, relying primarily on the Declaration of
 4 Sheryl Carrubba,⁷ Dkt. #22. According to Carrubba, the shoal at
 5 the Post Office Bar has increased approximately ten inches in the
 6 period from June 2010 to January 2011, and approximately five feet
 7 since the Post Office Bar was last dredged in 1989. *Id.*, ¶¶ 5 & 8
 8 & Ex. 1, p. 5; Exs. 9 & 10. Carrubba stated that "[i]n 2008, the
 9 Corps determined that the lack of maintenance dredging at Post
 10 Office Bar was presenting an increasing hazard to navigation and
 11 was impacting access to Willamette River terminals and berths."
 12 *Id.*, ¶ 5. She cites the Corps' May 6, 2011, Final Environmental
 13 Assessment ("EA") for the project as the best description of navi-
 14 gation hazards and safety concerns represented by the increased
 15 shoaling and lack of maintenance. *Id.* The EA is attached to
 16 Carrubba's Declaration as Exhibit 2. In the EA, the Corps stated
 17 the following regarding the condition of the Post Office Bar, and
 18 the need for maintenance dredging in the area:

19 The U.S. Army Corps of Engineers (Corps)
 20 is proposing to dredge a significantly shoaled
 21 area called Post Office Bar, located between

22 ⁷Sheryl Carrubba has been employed by the Corps for about
 23 twenty-five years, currently serving, since 2004, as "Operations
 24 Manager, Channels and Harbors Project, Operations Division,
 25 Portland District[.]" Dkt. #22, ¶ 1. She has coordinated dredging
 26 activities for the Corps, including budgeting, operations
 27 management of "hopper dredges and other floating plant (e.g.,
 28 survey boats), and personnel for these activities." *Id.*, ¶ 2. Since 2008, her responsibilities have included oversight of personnel involved in the proposed Post Office Bar dredging, management of the project, and environmental coordination for the project. *Id.* The court accepts Carrubba's factual representations as true for purposes of the plaintiff's motion for preliminary injunction.

1 Willamette River mile (WRM) 2 and 3 in the
2 lower Willamette River federal navigation
3 channel (LWR FNC). The entire LWR FNC is
4 almost 12 miles long and extends from the
5 mouth of the Willamette River to the Broadway
6 Bridge in Portland, Oregon [citation omitted].
The purpose of the proposed dredging project
at Post Office Bar is to restore the 40-foot
channel depth to allow for safe passage of
deep-draft vessels that transport goods to and
from some portions of Portland Harbor.

7 Channel maintenance at Post Office Bar is
8 needed because a significant amount of
shoaling has taken place since the channel in
this location was last dredged in 1989. Post
9 Office Bar poses a problem for outbound
vessels because it occurs on an inside bend on
the east bank of the river. The lack of
10 maintenance dredging in this area presents a
hazard to navigation and impacts access to LWR
11 terminals and berths. Over 1,100 vessels
transited past this shoal in 2008. Because of
12 increasingly shallow depths, vessels are
forced to transit at high tide only. With the
13 high volume of traffic and timing constraints
due to tidal influence, the potential for
14 daily head-on encounters is greatly increased.
The reduced channel width from shoaling in
15 this area is especially dangerous because
vessels moving around the bend in the river
must orient the vessel at an angle. This
16 maneuver requires more channel width than when
the same vessels are transiting a straight
stretch. Ships transiting this river bend
17 also have to increase power to make the shoal-
restricted turn. This increased speed creates
18 a stronger likelihood that ships moored at the
nearby T5 terminal could be pulled away from
the dock. This can be damaging to the moored
19 vessel, dangerous to work crews, and increase
the risk of damage or loss of equipment and
20 shipped goods as they are moved to or from the
21 shore.

22 Large deep-draft vessels are now at the
point of having to use the area as if it were
23 a one-way channel or resort to a tug boat
assisted transit. However, smaller vessels
24 such as barges, tugs and recreational boats
are still using the area and their presence
narrow the usable path that the larger ships
25 have available to maneuver the turn, and also
increases the possibility of a potentially
26 lethal collision or a high-energy ship
grounding which could crack a ship's hull.
27 The Columbia River Pilots have expressed grave
28

1 concerns about this increasingly hazardous
2 area and have specifically requested that the
3 Corps dredge as soon as possible. Every year
4 that the area goes without dredging the chan-
5 nel becomes narrower and shallower, increasing
6 the danger of a high-energy ship grounding or
7 collision. Such an accident could have deva-
8 stating environmental, economic, and social
9 impacts. The shoal continued to accumulate an
10 additional 10 inches of sediment between Corps
11 hydrographic surveys taken in June 2010 and
12 January 2011. The most recent survey shows
13 shoaling shallower than 34 feet in the 40-foot
14 navigation channel.

15 *Id.*, Ex. 2, p. 1.

16 The defendants note that the area of the proposed dredging
17 lies within a designated Superfund site within Portland Harbor, and
18 “both the dredged and newly-exposed surface material will contain
19 concentrations of chemicals.” Dkt. #19, p. 7 (citing Dkt. #22-11,
20 p. 2; Dkt. #22-2, p. 16). However, they further state that
21 “because Post Office Bar is a depositional area, new, cleaner
22 material is expected to cover the exposed surface relatively
23 quickly.” *Id.* In addition, the Corps has “incorporated numerous
24 protective measures into the project to minimize the potential for
25 adverse environmental impacts, including impacts on threatened
26 salmon and steelhead.” *Id.* (citing Dkt. #22-2, pp. 16-18; Dkt.
27 #22-12, pp. 5-10). Among other things, these protective measures
28 include the following: (1) the dredging project will occur during
 the in-water work window, “when few salmonids are expected to be in
 the project area”; *id.* (citing Dkt. #22-2, p. 16); (2) the dredging
 activity “is limited to one month”; *id.* (citing Dkt. #22-11, p. 4;
 Dkt. #22-12, p. 1); (3) “[a] close-lipped ‘clamshell’ dredge must
 be used to minimize turbidity and reduce sediment drift during
 dredging”; *id.* (citing Dkt. #22-11, p. 3); (4) dredging will occur

1 first in the areas with the highest chemical concentrations "to
2 prevent contamination of cleaner areas and minimize downstream
3 impacts"; *id.* (citing Dkt. #22-2, p. 17); (5) "[i]f listed
4 salmonids are observed in distress or killed during dredging
5 activities, dredging operations will immediately cease and NMFS
6 will be notified"; *id.* (6) "[a]ll dredged material must be placed
7 in watertight transport barges to avoid discharge during
8 transport"; *id.* (citing Dkt. #22-11, p. 3); (7) "dredged material
9 will be transported to an existing upland facility where it will be
10 contained by dikes and managed to prevent it from moving outside
11 the site boundary"; *id.*; and (8) "[p]lacement of material at the
12 upland disposal site will not affect any aquatic species or
13 habitat." *Id.*; see BiOp at 3-4.

14 The defendants note that when NMFS issued the May 13, 2010,
15 BiOp, it defined an "action area" that not only included the 0.3-
16 mile stretch encompassing the Post Office Bar (i.e., the area
17 between River Miles ("RM") 2.1 and 2.4), it included the entire
18 area from the Willamette River's confluence with the Columbia River
19 to RM 2.9, "to encompass[] the full geographic extent of any direct
20 or indirect effects of the project." Dkt. #19, p. 8 (citing the
21 BiOp, p. 4). The defendants argue NMFS used "the best available
22 science" to review the status of the affected salmonids and their
23 habitat, evaluated the environmental baseline of the species in the
24 action area, evaluated "the effects of the action and cumulative
25 effects," and "concluded that the project is not likely to
26 jeopardize the continued existence of any listed species or degrade
27 critical habitat." *Id.* (citing the BiOp, pp. 6-21).

28

1 The defendants state that because NMFS found "only a small
2 number of individual juvenile salmonids are likely to be harmed by
3 the project," it included an ITS that estimates the amount or
4 extent of incidental take. NMFS was unable to determine a specific
5 number of fish likely to be taken, so it "used two surrogates to
6 estimate take: dredging duration and anticipated turbidity levels."
7 *Id.* (citing the BiOp, p. 22). "The ITS contains monitoring
8 requirements to ensure that the surrogate take levels are not
9 exceeded, and other terms and conditions to minimize the impact of
10 any take." *Id.* (citing the BiOp, pp. 23-26). The Corps made an
11 independent determination that no significant impact would occur to
12 the listed salmon or steelhead "given the minimal geographic scope
13 and duration of the project and the many protective measures." *Id.*
14 (citing Dkt. #22-2, pp. 44-46, 53; Dkt. #22-11, pp. 4-5, 7).

15

16 **IV. THE MAY 13, 2010, BiOp**

17 In October 2008, the Corps submitted a letter and a biological
18 assessment to NMFS regarding the proposed maintenance dredging
19 action at the Post Office Bar. The Corps had concluded that the
20 proposed action likely would have adverse effects on the Pacific
21 salmonids at issue in this case, and also affect the species'
22 critical habitat. BiOp at 1. Historically, the last dredging
23 action in the area took place in 1997. Maintenance dredging was
24 begun in 2000, but the action was suspended because Portland Harbor
25 was designated as a Superfund site. Since 2000, significant
26 shoaling has occurred at the Post Office Bar, and the Columbia
27 River Pilots "have requested that the Corps dredge this area since
28

1 it poses a problem for outbound vessels because it occurs on an
2 inside bend in the river." BiOp at 2.

3 In proposing the action, the Corps listed eight measures they
4 would take to reduce adverse effects on the ESUs and their
5 habitats. See BiOp at 3-4, summarized *supra*. NMFS relied on the
6 Corps' description of these preventative measures and the Corps'
7 description of the proposed action in completing its consultation.
8 BiOp at 4. The "action area" identified by NMFS "is the Willamette
9 River, extending 0.5 miles upstream from the dredging (RM 2.9) and
10 downstream to the confluence with the Columbia River[,] . . . based
11 on the possible extent of turbidity and contaminant dispersion due
12 to dredging during a complete tidal cycle." *Id.*

13 In the BiOp, NMFS noted that to complete its jeopardy
14 analysis, it "reviewed the status of each listed species considered
15 in [the] consultation, the environmental baseline in the action
16 area, the effects of the action, and cumulative effects." BiOp at
17 5 (citation omitted). For its critical habitat adverse modifi-
18 cation analysis, "NMFS considered the status of the entire
19 designated area of the critical habitat considered in [the]
20 consultation, the environmental baseline in the action area, the
21 likely effects of the action on the function and conservation role
22 of the affected critical habitat, and cumulative effects." *Id.*
23 NMFS considered whether, if the proposed action went forward,
24 "critical habitat would remain functional, or retain the current
25 ability for the primary constituent elements (PCEs) to become
26 functionally established, to serve the intended conservation role
27 for the species[.]" *Id.* (citing a 2005 memorandum from William T.
28 Hogarth to Regional Administrators, Office of Protected Resources,

1 NMFS, Regarding Application of the "Destruction or Adverse
 2 Modification" Standard Under Section 79a)(2) of the ESA (Nov. 7,
 3 2005)).

4 NMFS explained that it considers the current condition of the
 5 listed species "using criteria that describe a 'viable salmonid
 6 population' (VSP)." BiOp at 6.

7 Attributes associated with a VSP include
 8 abundance, productivity, spatial structure,
 9 and genetic diversity that enhance [the
 10 species'] capacity to adapt to various
 11 environmental conditions and allow it to
 12 sustain itself in the natural environment.
 These attributes are influenced by survival,
 behavior, and experiences throughout the
 entire life cycle, characteristics that are
 influenced in turn by habitat and other
 environmental conditions.

13 *Id.* Using these criteria, NMFS identified a number of "major
 14 factors limiting the recovery" of the Lower Columbia River Chinook
 15 salmon, noting that a 2007 viability status report estimated the
 16 population was in the "extirpated or nearly so" persistence
 17 category. *Id.* NMFS indicate the LCR Chinook salmon population is
 18 "at high risk," and "[f]urther habitat changes in the Willamette
 19 River and in the Columbia River mainstem and estuary would likely
 20 have a significant effect on fall Chinook salmon." *Id.* (citing
 21 McElhany, P., M. Chilcote, J. Myers, R. Beamesderfer, "Viability
 22 Status of Oregon Salmon and Steelhead Populations in the Willamette
 23 and Lower Columbia Basin" (Sept. 2007), a report prepared for the
 24 Oregon Department of Fish and Wildlife, and the National Marine
 25 Fisheries Service, NOAA Northwest Fisheries Science Center,
 26 Seattle) ("McElhany 2007").

27 Regarding the Upper Willamette River spring-run Chinook
 28 salmon, NMFS found their numbers to be "extremely depressed." BiOp

1 at 7 (citing McElhany 2007). NMFS noted the species has "been
2 adversely affected by the degradation and loss of spawning and
3 rearing habitat (loss of 30 to 40%) associated with hydropower
4 development, and interaction with a large number of natural-
5 spawning hatchery fish." *Id.* Other major factors limiting the
6 recovery of this species also were noted. See *id.* NMFS noted the
7 McElhany 2007 study found the risk of extinction of this species to
8 be high. *Id.*

9 With regard to the Lower Columbia River coho salmon, NMFS
10 noted that in general, the 25 populations that existed historically
11 in the Columbia River basin from the Hood River downstream "have
12 been in decline for the last 75 years." *Id.* Historically, the
13 numbers of wild coho returning "was at least 600,000 fish," while
14 "[a]s recently as 1996, the total return of wild fish may have been
15 as few as 400 fish." *Id.* However, in the past five years, the
16 numbers of wild coho in the Clackamas, Sandy, Scappoose, and
17 Clatskanie Rivers have increased moderately. *Id.* NMFS identified
18 several major factors limiting recovery of the LCR coho salmon, and
19 stated "the risk of extinction for coho in Oregon remains high."
20 BiOp at 7-8.

21 NMFS conducted a similar analysis with regard to the Upper
22 Willamette River and Lower Columbia River steelhead, concluding the
23 risk of extinction of both species is "moderate." BiOp at 8-9.

24 In considering the critical habitat of all of the listed
25 species, NMFS found "the value of critical habitat for salmon and
26 steelhead is limited by poor water quality, altered hydrology, lack
27 of floodplain connectivity and shallow-water habitat, and lack of
28 complex habitat to provide forage and cover." BiOp at 10. NMFS

1 noted other factors likely to have "negative implications for the
2 conservation value of designated critical habitats in the Pacific
3 Northwest" including climate change, urban development, and
4 industrial harbor and port development, all of which will affect
5 the designated critical habitats to some degree. BiOp at 9-11.

6 In determining the environmental baseline for the action area,
7 NMFS noted the Post Office Bar site is within a designated
8 Superfund site, "and is downstream from many sources of industrial
9 contamination. In addition, the river receives direct inputs of
10 treated municipal wastes and industrial effluents that may
11 contribute to the contamination of the river." BiOp at 11.
12 However, NMFS described vibra-core sampling of sediment at the Post
13 Office Bar conducted on February 11, 2009, that indicated "material
14 that would fill in the dredged channel is relatively clean and
15 would accumulate relatively quickly." *Id.* NMFS noted that habitat
16 conditions are "highly degraded" in the Lower Willamette River due
17 to channelizing of streambanks, diking and filling of connected
18 channels and wetlands, and other factors. "Both juvenile and adult
19 Chinook salmon, coho salmon, chum salmon, and steelhead use the
20 dredging area as a migratory corridor and as rearing habitat for
21 juveniles." BiOp at 12; see BiOp at 11-13.

22 Regarding the effects of the proposed action, NMFS indicated
23 the action "will affect the salmonid species considered in [the
24 BiOp] by causing physical, chemical, and biological changes to the
25 environmental baseline, and through direct effects . . .
26 includ[ing] interaction with fish migrating through or rearing
27 within the action area during dredging, effects to benthic and
28 pelagic forage opportunities, and short-term negative water quality

1 effects (turbidity and increased exposure to contaminants)." BiOp
2 at 14. NMFS noted that both salmon and steelhead will be present
3 in the area when the dredging occurs, and therefore their migration
4 "may be delayed and fish will likely avoid the project vicinity."
5 BiOp at 16. If they are delayed in areas where cover and forage
6 are unavailable, "then the delay will mean greater risk of
7 predation, increased exposure to contaminants, and energetic costs
8 associated with poor food availability and swimming in current."
9 *Id.* Juveniles will be affected more than adults, and juvenile
10 salmonids will be more vulnerable than the adults to high
11 concentrations of PCBs. *Id.*

12 After considering the probable concentrations of contaminants
13 and exposures to the listed species, NMFS concluded as follows:

14 Since the proposed action will cause short-
15 term (weeks) increases in contaminants in the
16 water column and medium-term (months)
17 increases in contaminants in the post-dredge
18 surface until new, cleaner sediment accumu-
19 lates, exposure to contaminants as a conse-
20 quence of the proposed action is unlikely to
result in lethality on a measurable scale, but
may result in behavioral changes (e.g.,
avoidance, altered feeding, delayed migra-
tion), physiological stress, and reduced
fitness of juvenile ESA-listed salmonids that
will likely lead to injury in some cases.

21 BiOp at 17-18. NMFS further found that "[o]ver the long term
22 (years), the proposed action will maintain existing water quality
23 and habitat conditions at Post office Bar." BiOp at 18. In
24 addition, "[e]ven among juveniles, only a small portion of the
25 individuals are likely to be killed or injured by effects of the
26 dredging. Therefore, too few fish will be affected to produce a
27 measureable [sic] effect on abundance, productivity, distribution,
28

1 or genetic diversity of any of the affected populations." BiOp at
 2 18-19.

3 Regarding the effects on critical habitat, NMFS found the
 4 proposed action likely would "cause minor, localized and temporary
 5 (weeks to months) degradation of critical habitat PCEs for water
 6 and sediment quality, forage, and free passage. None of these
 7 adverse effects are likely to be significant at the scale of the
 8 river reach or watershed." BiOp at 19.

9 NMFS concluded that the proposed action would not likely
 10 jeopardize the continued existence of the ESUs, nor would it
 11 "result in the destruction or adverse modification of designated
 12 critical habitats for these salmonids." BiOp at 20. NMFS
 13 indicated the Willamette River likely will continue to be used as
 14 a major shipping lane "for decades," during which the "current
 15 degraded value of critical habitat" will continue unabated. "The
 16 negative effects of the action will be brief or an extension of the
 17 existing conditions, and will not contribute to a reduction in the
 18 conservation value of designated critical habitat for the ESA-
 19 listed species." BiOp at 20-21.

20

21 **V. THE INCIDENTAL TAKE STATEMENT**

22 In the ITS, NMFS first set forth the likely consequences of
 23 the dredging operation on the listed species:

24 Activities necessary to complete the proposed
 25 maintenance dredging at Post Office Bar will
 26 take place within the active channel of the
 27 Willamette River when individuals of chinook
 28 salmon, coho salmon, and steelhead considered
 in [the BiOp] are likely to be present.
 Adverse effects of the proposed action will
 include the temporary loss of prey items for
 rearing juveniles, and an increase in turbi-

dity, sediment, and pollutants such as DDT, PCBs, and metals. The habitat that will be adversely affected by the proposed action is of moderate to poor quality and not limited at the site-specific or watershed scale. Nonetheless, these effects are reasonably likely to result in injuries and deaths of some juveniles of all species covered in [the BiOp] (except Columbia River chum salmon) within the action area.

BiOp at 22. NMFS indicated it is unable to predict precisely the numbers of "fish that are reasonably certain to be injured or killed if their habitat is modified or degraded by the proposed action." *Id.* It opined that the "best available indicators for the extent of take are duration of the proposed dredging and the extent of suspended sediment plumes." *Id.* If the thresholds for either of those indicators are exceeded for extent of take, that would trigger a re-initiation of consultation before further action is taken. *Id.*

NMFS listed two "reasonable and prudent measures" it found "necessary and appropriate to minimize the impact of incidental take of ESA-listed species from the proposed action," *id.*, to-wit:

The Corps shall:

1. Minimize incidental take from dredging by applying conditions to the proposed action that avoid or minimize adverse effects to water quality and benthic invertebrate organisms.
2. Ensure completion of a monitoring and reporting program to confirm this incidental take statement is meeting its objective of minimizing incidental take from the proposed action.

BiOp at 23.

In order to "implement reasonable and prudent measure #1," NMFS set out an extensive list of non-discretionary measures that

1 must be undertaken by the Corps. See BiOp at 23-26. These
2 measures include, *inter alia*, limiting dredging to the "summer in-
3 water work window (July 1 through October 31)"; collecting and
4 analyzing benthic samples; confining "dredging impacts to the
5 minimum area and duration necessary to complete the project";
6 beginning the dredging in the areas of highest contamination first;
7 ensuring that "all digging passes of the bucket will be completed
8 without any material intentionally being returned to the wetted
9 area," and without dumping of dredged material back into the
10 project area; not over-filling the bucket; closing the bucket
11 slowly on the bottom, and pausing before hoisting the bucket to
12 allow any overage to settle; monitoring turbidity; ceasing dredging
13 operations if the weather conditions will not allow monitoring;
14 keeping daily logs of turbidity monitoring; implementing a
15 pollution control plan to prevent pollutants caused by the dredging
16 from entering the river; monitoring the depth of new sediment
17 accumulation and new surface sediment quality; and deploying "an
18 absorptive boom during dredging to capture contaminants that may be
19 floating on the water surface as a consequence of dredging." *Id.*
20 In addition, should any future maintenance dredging take place, the
21 Corps must ensure that "at least 1 foot of new sediment accumulated
22 after this current dredging operation must be left in place so the
23 dredged surface or sand cap is not re-exposed in the future." BiOp
24 at 26.

25 To implement reasonable and prudent measure #2, the ITS
26 directs the Corps to report all monitoring items to NMFS within
27 specified time limits, and immediately report to NMFS "[a]ny
28 exceedance of take covered by [the ITS]." *Id.* The Corps also must

1 report immediately any sick, injured, or dead fish that are found
 2 in the project area, and take remedial action "[i]f the proposed
 3 action may worsen the fish's condition before NMFS can be
 4 contacted," such as moving the fish to reduce its stress as much as
 5 possible. *Id.*

6

7 **VI. PRELIMINARY INJUNCTION STANDARDS**

8 Having now fully examined the nature of the proposed dredging
 9 action, the historical background, and the BiOp and ITS at issue,
 10 the court turns to consideration of the plaintiffs' motion for
 11 preliminary injunction. Ordinarily, to prevail on a motion for
 12 preliminary injunction, a party must show (1) either a likelihood
 13 of success on the merits of the case, or the existence of "serious
 14 questions going to the merits," *Alliance for the Wild Rockies v.*
 15 *Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011); (2) a likelihood
 16 that the party will suffer irreparable harm in the absence of
 17 preliminary relief, (3) that the balance of equities (or
 18 "hardships") tips in the party's favor, *see id.*; and (4) that
 19 issuance of a preliminary injunction is in the public interest.
 20 *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009)
 21 (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S.
 22 7, ___, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008); *see*
 23 *Cottrell*, 632 F.3d at 1134 (noting the "'serious questions' version
 24 of the sliding scale test for preliminary injunctions remains
 25 viable after the Supreme Court's decision in *Winter*).

26 However, the Ninth Circuit has articulated a standard for
 27 preliminary injunctive relief in ESA cases "that arguably complete-
 28 ly precludes the balancing of relative harms." *Pacific Coast Fed.*

1 of *Fisherman's Ass'ns v. Gutierrez*, 606 F. Supp. 2d 1195, 1204 n.6
 2 (E.D. Cal. 2008) (noting “[d]istrict courts in other circuits have,
 3 in an abundance of caution, applied the traditional approach to
 4 injunctive relief, while at the same time recognizing the balancing
 5 of the equities and the determination of the public interest
 6 already performed by Congress”) (citations omitted). Thus, in the
 7 Ninth Circuit:

8 The traditional preliminary injunction
 9 analysis does not apply to injunctions issued
 10 pursuant to the ESA. *Nat'l Wildlife Fed'n v.*
 11 *Burlington N. R.R., Inc.*, 23 F.3d 1508, 1510
 12 (9th Cir. 1994). “In cases involving the ESA,
 13 Congress removed from the courts their tradi-
 14 tional equitable discretion in injunction pro-
 15 ceedings of balancing the parties’ competing
 16 interests.” *Id.* at 1511 (citing *Friends of*
 17 *the Earth v. United States Navy*, 841 F.2d 927,
 18 933 (9th Cir. 1988)). As the Supreme Court
 19 has noted, “Congress has spoken in the
 20 plainest of words, making it abundantly clear
 21 that the balance has been struck in favor of
 22 affording endangered species the highest of
 23 priorities.” *TVA v. Hill*, 437 U.S. 153, 194,
 24 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978).
 25 Accordingly, courts “may not use equity’s
 26 scales to strike a different balance.” *Sierra*
 27 *Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir.
 28 1987); see also *Marbled Murrelet v. Babbitt*,
 29 83 F.3d 1068, 1073 (9th Cir. 1996) (“Congress
 30 has determined that under the ESA the balance
 31 of hardships always tips sharply in favor of
 32 endangered or threatened species.”).

33 *National Wildlife Fed. v. NMFS*, 422 F.3d 782, 793-94 (9th Cir.
 34 2005) (quoted with approval in *Pacific Coast Fed.*, 606 F. Supp. 2d
 35 at 1204, cataloguing cases in accord). In light of this
 36 determination, the *National Wildlife Federation* court rejected the
 37 appellants’ argument that the district court had erred as a matter
 38 of law in failing to conduct a traditional preliminary injunction
 39 analysis. The court noted, “As the Supreme Court has instructed,
 40 such an analysis does not apply to ESA cases because Congress has

1 already struck the balance." *Id.*, 422 F.3d at 794 (citation
2 omitted).

3 The court, therefore, must consider, first, whether the
4 plaintiffs have met their burden to show either a likelihood of
5 success on the merits, or alternatively, the existence of
6 "substantial questions" regarding the merits. Second, the court
7 must consider whether the plaintiffs have shown a likelihood of
8 irreparable harm if the injunction is not issued.
9

10 **VII. LIKELIHOOD OF SUCCESS/SUBSTANTIAL QUESTIONS**

11 In considering the plaintiffs' likelihood of success on the
12 merits, the court first must examine the plaintiffs' claims in this
13 case, and the defendants' and intervenor's responses. In a
14 nutshell, the plaintiffs do not seek to prevent the dredging action
15 in the Post Office Bar completely; rather, they argue NMFS and the
16 Corps have failed to comply with their statutory and regulatory
17 obligations in connection with the proposed project, and they seek
18 to halt the proposed action until the defendants have consulted as
19 required and have considered the continuum of adverse impacts on
20 the listed species over time.
21

22 **A. The plaintiffs' arguments**

23 The plaintiffs argue NMFS and the Corps failed to use "the
24 best scientific and commercial data available," as required by
25 section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and 50 C.F.R.
26 § 402.14(d). They note that the regulations require the defendants
27 to evaluate both "the current status of the listed species or
28

critical habitat," and "the effects of the action⁸ and cumulative effects on the listed species or critical habitat." 50 C.F.R. § 402.14(g)(2) & (3). They assert that the regulations "define the latter to include a 'snapshot' of the species' and critical habitat's health in light of all actions that have previously taken place in the action area." Dkt. #6, p. 16 (citation omitted)

The plaintiffs rely on *Defenders of Wildlife v. Babbitt*,⁹ 130 F. Supp. 2d 121 (D.D.C. 2001), for the proposition that NMFS's practice of viewing each federal action and incidental take in

⁸ Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. **The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area**, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

50 C.F.R. § 402.02 (emphasis added).

⁹The plaintiffs mistakenly cite this case as *Fund for Animals v. Babbitt*. See Dkt. #6, pp. 16-17. The *Defenders of Wildlife* court cites a case entitled *Fund for Animals v. Babbitt*, 903 F. Supp. 96 (D.D.C. 1995), but it is the *Defenders of Wildlife* case that is on point here.

1 isolation from other impacts on the listed species is unlawful.
 2 *Defenders of Wildlife* concerned BiOps prepared by the Fish and
 3 Wildlife Service ("FWS") relating to the survival of Sonoran
 4 pronghorn. The plaintiffs in *Defenders of Wildlife* argued, among
 5 other things, that the BiOp and Biological Assessments prepared by
 6 the defendants pursuant to EPA section 7's consultation
 7 requirements were "deficient because they fail[ed] to analyze the
 8 cumulative impacts or effects of other federal agency activities on
 9 the survival of the Sonoran pronghorn[.]" *Id.*, 130 F. Supp. 2d at
 10 122. The court first discussed the standard of review of the
 11 agencies' actions, noting:

12 In reviewing the action of the agencies,
 13 the Court must engage in a "thorough, probing,
 14 in-depth review," *Citizens to Preserve Overton*
Park v. Volpe, 401 U.S. 402, 415, 91 S. Ct.
 15 814, 28 L. Ed. 2d 136 (1971), to determine
 16 whether the agencies have "examine[d] the
 17 relevant data and articulate[d] a satisfactory
 18 explanation for its action. . . ." *Motor*
Vehicle Manufacturer's Ass'n v. State Farm
Mutual Automobile Ins. Co., 463 U.S. 29, 43,
 19 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). "In
 20 thoroughly reviewing the agency's actions, the
 21 Court considers whether the agency acted
 22 within the scope of its legal authority,
 whether the agency has explained its decision,
 whether the facts on which the agency purports
 to have relied have some basis in the record,
 and whether the agency considered the relevant
 factors." *Fund for Animals v. Babbitt*, 904
 F. Supp. 96, 105 (D.D.C. 1995) [citation omit-
 ted].

23 *Defenders of Wildlife*, 130 F. Supp. 2d at 124. The court then
 24 examined the statutory framework, and determined that FWS had
 25 failed to comply with section 7(a)(2) of the EPA, which requires
 26 the agency to insure that its actions are "not likely to jeopardize
 27 the continued existence of" the listed species at issue. *Id.*, 130
 28 F. Supp. 2d at 125 (citing 16 U.S.C. § 1536(a)(2)).

1 The court held that FWS was required to "analyze the effects
2 of the action in conjunction with the effects of other agencies'
3 actions on the pronghorn" something it had failed to do in its
4 BiOp. *Id.*, 130 F. Supp. 2d at 126. More specifically, the court
5 held "[t]he impact of an authorized incidental take cannot be
6 determined or analyzed in a vacuum, but must necessarily be
7 addressed in the context of other incidental take authorized by
8 FWS. . . . The [BiOp] must also include an analysis of the effects
9 of the action on the species when 'added to' the environmental
10 baseline - in other words, an analysis of the *total* impact on the
11 species." *Id.*, 130 F. Supp. 2d at 127-28 (quoting 50 C.F.R.
12 § 402.02 (emphasis in original)). The court did not limit its
13 holding to the "action area" of the project in question, finding
14 that the agency could not define the action area narrowly "to
15 exclude federal activities that are impacting the pronghorn." *Id.*,
16 130 F. Supp. 2d at 126. The court effectively required FWS to
17 consider the cumulative impact on the pronghorn species-wide. See
18 *id.*

19 The plaintiffs argue that nearly all of the over 150 BiOps
20 issued by NMFS since 2005 "for projects with adverse impacts on
21 listed Willamette ESUs have included ITSs authorizing some level of
22 incidental take of these fish," yet NMFS has failed to keep track
23 of the cumulative incidental take over time. Dkt. #6, p. 17.
24 Nevertheless, NMFS continues to issue additional authorizations for
25 incidental take of "species which NMFS expressly acknowledges are
26 near extinction." Dkt. #6, pp. 17-18.

27 The plaintiffs argue the BiOp itself is "the best evidence"
28 that NMFS has failed to consider the impact of other federal

1 actions on the listed ESUs and critical habitat. "For example,
2 NMFS cites to a 2007 study finding that lower Columbia River
3 chinook were at 'high risk' as of that date, and concluding that
4 '[f]urther habitat changes in the Willamette River mainstem and
5 estuary would have a significant effect on fall Chinook salmon.'"
6 Dkt. #6, pp. 16-17 (citing BiOp at 6). The plaintiffs assert that
7 information is readily available to NMFS about take it has
8 authorized previously "by simply examining its prior incidental
9 take statements, yet NMFS did not consider this information prior
10 to issuing the incidental take statement as part of the Post Office
11 Bar BiOp." Dkt. #6, p. 18. The plaintiffs claim NMFS continues to
12 cite the same information repeatedly in its BiOps and ITSSs
13 regarding the current status of the ESUs and their habitat, despite
14 the fact that NMFS "repeatedly authorizes additional adverse
15 impacts and additional take[.]" *Id.*

16 The plaintiffs further argue NMFS failed to take into account
17 its own 2008 Jeopardy BiOp, including consideration of whether the
18 Corps is implementing the RPA and, if so, the effectiveness of
19 those measures. Dkt. #6, pp. 19-20. Again, the plaintiffs argue,
20 this information should be "readily available to NMFS given that
21 the agency is part of every work group and decision-making body for
22 implementing the RPA." Dkt. #6, p. 20.

23 The plaintiffs conclude that NMFS has ready access to informa-
24 tion that is relevant and vital to its jeopardy assessment in
25 connection with the proposed dredging project. The plaintiffs
26 assert that information included in NMFS's prior BiOps and ITSSs,
27 "as well as monitoring data relevant to measures set forth in the
28 Willamette Project RPA, constitutes the 'best science' regarding

1 the status of ESUs and their critical habitat affected by the Post
2 Office Bar project." Dkt. #6, p. 21. The plaintiffs argue NMFS's
3 failure to consider this available information in formulating the
4 BiOp violated the agency's duty under section 7 of the ESA to use
5 the "best available science." *Id.*

6 The plaintiffs further argue NMFS's conclusions regarding the
7 likely effects of the proposed action are arbitrary and capricious.
8 They assert that NMFS's failure to consider the impacts of past
9 actions on the ESUs and critical habitat is like a person
10 continually withdrawing money from a bank account without checking
11 the balance first, resulting in the clear possibility that
12 eventually, the account will be overdrawn. The plaintiffs argue
13 NMFS's continuing to authorize adverse impacts and take without
14 assessing whether the 2008 RPA has been effective is arbitrary and
15 capricious. Dkt. #6, pp. 21-22.

16 The plaintiffs also argue NMFS has failed to consider the
17 short-term adverse impacts to the listed ESUs. They rely on
18 *Pacific Coast Federation of Fishermen's Association, Inc. v. NMFS*,
19 265 F.3d 1028 (9th Cir. 2001), where they state "the Ninth Circuit
20 overturned a NMFS BiOp for failing to consider short-term adverse
21 impacts to a salmon run despite acknowledging that 'even a low
22 level of additional impact to any life form, especially the
23 anadromous form which is at critically low levels, may reduce the
24 likelihood of survival and recovery of the ESU as a whole.'" Dkt.
25 #6, p. 22 (quoting *Pacific Coast*, 265 F.3d at 1037-38). The
26 plaintiffs argue the same conditions are present in the present
27 case as those the *Pacific Coast* court considered. They argue that
28 although the 2008 Jeopardy BiOp set forth short-term measures

1 intended to prevent extinction of Lower Columbia Chinook, NMFS
2 arbitrarily ignored "short-term impacts to this and other ESUs by
3 reasoning that, despite short-term harms due to the proposed
4 dredging, their habitat will not be any worse than normal over the
5 long term." Dkt. #6, pp. 22-23.

6 Contending NMFS failed to consider important aspects of the
7 potential impacts of the Post Office Bar project, the plaintiffs
8 argue the BiOp is arbitrary and capricious. *Id.*, pp. 23-24
9 (quoting *Greenpeace v. NMFS*, 80 F. Supp. 2d 1137, 1147 (W.D. Wash.
10 2000) ("A biological opinion is arbitrary and capricious and will
11 be set aside when it has failed to articulate a satisfactory
12 explanation for its conclusions or when it has entirely failed to
13 consider an important aspect of the problem.")).

14 The plaintiffs also argue the Corps failed to meet its "free-
15 standing obligation to ensure that its actions are not likely to
16 jeopardize affected ESUs or destroy or adversely modify their
17 critical habitat." Dkt. #6, p. 24 (citing *Resources Limited v.*
18 *Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1993)). The plaintiffs
19 contend the information on past federal actions in the area is
20 equally available to the Corps as it is to NMFS, and the Corps
21 failed to consider the applicable information and arrived at an
22 arbitrary conclusion. *Id.*

23 The plaintiffs also argue the ITS is unlawful because the
24 surrogates employed by NMFS are "'coextensive with the project's
25 own scope' and both 'define[] and limit[] the level of take using
26 the parameters of the project,'" a practice the plaintiffs state
27 was deemed unlawful in *Oregon Natural Resources Council v. Allen*,
28

1 476 F.2d 1031, 1039 (9th Cir. 2007) ("ONRC"). Dkt. #6, p. 25
 2 (quoting *ONCR v. Allen, supra*). The plaintiffs argue

3 NMFS' [s] use of surrogates for defining allowable
 4 incidental take without linking those
 5 surrogates in a meaningful way to actual take
 6 is much like tracking one's bank account
 7 withdrawals by taking notes such as "today I
 8 took some money out of my account," and
 9 "yesterday I withdrew a bit from my account."
 Such notations are just as meaningless for
 tracking total withdrawals of money from a
 bank account as "dredging for one month
 causing 5 NTUs over background turbidity" is
 for keeping track of the number of total
 salmon and steelhead injured or killed.

10 Dkt. #6, p. 26.

11 The plaintiffs also note that in some ITSs issued by NMFS, the
 12 agency *did* provide actual numeric estimates of the number of ESUs
 13 likely to be killed or injured by a proposed project, yet NMFS did
 14 not even consider those numbers in the BiOp and ITS prior to
 15 authorizing additional incidental take. The plaintiffs assert this
 16 failure "demonstrates NMFS' [s] complete lack of effort to track
 17 total take of listed ESUs over time, no matter how it is quantified
 18 or estimated." *Id.* The plaintiffs conclude that this failure
 19 renders the 2010 BiOp arbitrary. *Id.*, pp. 26-27.

21 ***B. The defendants' arguments***

22 The defendants argue NMFS did, in fact, use the "best
 23 available scientific data" in its assessment of the current status
 24 of the affected salmonids and critical habitat. Addressing the
 25 plaintiffs' argument that NMFS uses the same language repeatedly in
 26 the environmental baseline section of its BiOps relating to the
 27 current status of the listed species and critical habitat, the
 28 defendants point to the Consultation Handbook's "guidance on the

1 type of information used to prepare this section of a biological
 2 opinion." Dkt. #19, p. 11. The Consultation Handbook indicates
 3 the BiOp should include information on the life history, habitat,
 4 and distribution of the species, "'and other data on factors
 5 necessary to its survival . . . to provide background for analyses
 6 in later sections. This analysis documents the effects of all past
 7 human and natural activities or events that have led to the current
 8 status of the species.'" *Id.* (quoting Consultation Handbook at 4-
 9 19) The Consultation Handbook expressly provides, "'Once this
 10 section is developed for a given species, it can be used in
 11 successive biological opinions. Modification is necessary only
 12 when new information is developed.'" *Id.* (quoting Consultation
 13 Handbook at 4-20).

14 The defendants note that NMFS uses the four VSP criteria
 15 (abundance, productivity, spatial structure, and genetic diversity)
 16 as "a recognized 'framework for identifying the biological
 17 requirements of listed salmonids, assessing the effects of
 18 management and conservation actions, and ensuring that such actions
 19 provide for the survival and recovery of listed species.'" *Id.*
 20 (quoting 50 C.F.R. § 223.203(b)(4)(i)(B)). They assert that use of
 21 the VSP criteria for this purpose has been upheld by the courts
 22 repeatedly. Dkt. #19, p. 12 (citing *Trout Unlimited v. Lohn*, 559
 23 F.3d 946, 958 (9th Cir. 2009); *Northwest Environ. Def. Ctr. v.*
 24 NMFS, 647 F. Supp. 2d 1221, 1238 (D. Or 2009) (Mosman, J.)
 25 ("NEDC"); & *Consolidated Salmonid Cases*, 713 F. Supp. 2d 1116,
 26 1163-64 (E.D. Cal. 2010)).

27 The defendants note that the McElhany 2007 report, and a June
 28 2005 Technical Memorandum, both used the VSP criteria to complete

1 "comprehensive assessments of the status of the salmon and
2 steelhead at issue in this case." *Id.* McElhany 2007 assigned a
3 100-year extinction risk to each of the listed species, estimating
4 the extinction risk for Lower Columbia River and Upper Willamette
5 River Chinook, and Lower Columbia River coho salmon, as "high; and
6 the extinction risk for Lower Columbia River and Upper Willamette
7 River steelhead as "moderate." According to the defendants,
8 McElhany 2007 makes it clear that the short life span of the
9 salmonids requires data to be averaged over a period of time, and
10 assessing the risk of extinction involves a level of professional
11 judgment that takes into account information not readily
12 quantifiable. In other words, the defendants argue quantification
13 of the numbers of salmon affected by each separate incidental take
14 statement would be unrealistic as well as inaccurate. See *id.*,
15 pp. 13-14.

16 The defendants further assert that NMFS is not obligated to
17 conduct new studies and come up with new information; rather, the
18 'best available data' requirement "'merely prohibits [NMFS] from
19 disregarding available scientific evidence that is in some way
20 better than the evidence [NMFS] relies on.'" *Id.*, p. 14 (quoting
21 *Kern County Farm Bur. v. Allen*, 450 F.3d 1072, 1080-81 (9th Cir.
22 2006) (internal quotation marks, additional citation omitted).
23 They claim the plaintiffs' argument that the defendants failed to
24 use the best available data "will be rejected where the plaintiff
25 fails to 'cite[] any scientific studies that indicate the
26 [agency]'s analysis is outdated or flawed.'" *Id.* (quoting *Ecology*
27 *Ctr. v. Casteneda*, 574 F.3d 652, 659 (9th Cir. 2009)). The
28 defendants argue the plaintiffs have not cited any scientific data

1 or studies that supposedly would be better than the analyses upon
2 which NMFS relied, and "Plaintiffs' attempt to overturn the
3 agency's expert opinion based on little more than unsupported
4 armchair science should be rejected." *Id.*

5 The defendants further observe that not all of the BiOps
6 issued between the McElhany 2007 report and the May 2010 BiOp
7 documented only adverse impacts. They cite several instances where
8 BiOps actually found the agency actions under consultation would
9 benefit the affected species significantly. They also argue that
10 some of the authorized actions, whether their impacts were found to
11 be adverse or beneficial, resulted in no effect at all on any of
12 the factors limiting species recovery overall (i.e., "no effect on
13 the VSP"). Dkt. #19, p. 15 (citing *NEDC*, 647 F. Supp. 2d at 1238).

14 The defendants note that section 4 of the ESA requires NMFS
15 "to conduct a new status review of each listed species 'at least
16 once every five years,' . . . and, in fact, new status reviews for
17 the species at issue are underway." Dkt. #19, p. 16 (quoting 16
18 U.S.C. § 1533(c)(2); citing 75 Fed. Reg. 13,082 (Mar. 18, 2010)).
19 They further note the Consultation Handbook only requires that a
20 BiOp include a summary of the status of the species as background
21 information, rather than requiring a discussion of "every impact
22 discussed in every prior biological opinion." *Id.* (citing
23 Consultation Handbook at 4-19).

24 The defendants further claim the plaintiffs have misstated the
25 findings of the 2008 Jeopardy BiOp (referred to by the defendants
26 as the "Willamette Project BiOp"). The defendants state NMFS
27 evaluated that proposed project's impacts in the Upper Willamette
28 basin over a fifteen-year period, and once NMFS concluded the

1 proposed action "would be insufficient to avoid jeopardizing the
2 continued existence" of Upper Willamette River Chinook and
3 steelhead, NMFS then developed reasonable and prudent alternatives
4 "calling for the implementation of significant changes to the dams
5 and other facilities, including major construction projects to
6 provide fish passage, most of which are scheduled to be completed
7 between 2015 and 2024." Dkt. #19, p. 17 (citation omitted). In
8 addition, the defendants state NMFS found the RPA would benefit the
9 affected species substantially. The defendants further assert that
10 "contrary to Plaintiffs' insinuations, the Corps and the other
11 action agencies are actively implementing the RPA." *Id.* (citing
12 Dkt. #20, Decl. of Mindy Simmons, ¶¶ 4-8; Dkt. #21, Decl. of Kevin
13 McArdle, Ex. 3).

14 The defendants also assert the 2008 RPA did not mandate that
15 NMFS collect monitoring information to demonstrate that the short-
16 term measures were yielding overall improvement in the status of
17 the species. They note, "NMFS found that it would take years for
18 the RPA to yield a measurable improvement in the overall status of
19 the affected species[.]" Dkt. #19, p. 18. Thus, the defendants
20 argue, "the absence of data as of May 2010 indicating whether RPA
21 implementation had yielded a change in the overall status of UWR
22 Chinook in no way indicates NMFS's assessment of the status of the
23 species is at odds with the best data available. Plaintiffs'
24 'attempt to equate an absence of data with a failure to analyze
25 does not succeed.'" *Id.* (quoting *Oceana v. Norton*, 384 F. Supp. 2d
26 203, 231 (D.D.C. 2005); citing *Hammond v. Norton*, 370 F. Supp. 2d
27 226, 264 (D.D.C. 2005)). Essentially, the defendants argue NMFS
28 cannot analyze nonexistent data.

1 The defendants further contend that the plaintiffs are
2 proposing NMFS "institute a new system for conducting jeopardy
3 analyses that is akin to balancing a checkbook." Dkt. #19, p. 19.
4 The defendants argue this proposed methodology is unsupported by
5 any scientific data, and is foreclosed by NMFS's valid use of
6 surrogates to estimate incidental take. They rely on the court's
7 analysis in the *Consolidated Salmonid Cases*, 713 F. Supp. 2d 1116
8 (E.D. Cal. 2010), where the court held, "A decision about jeopardy
9 must be made based on the best science available at the time of the
10 decision; the agency cannot wait for or promise future studies."
11 *Id.*, 713 F. Supp. 2d at 1158. The plaintiffs in the *Consolidated*
12 *Salmonid Cases* argued NMFS "failed to apply the VSP methodology in
13 a sufficiently rigorous manner." *Id.*, 713 F. Supp. 2d at 1163.
14 The court found the plaintiffs' argument unpersuasive, holding as
15 follows:

16 The BiOp did not ignore the VSP methodology.
17 Rather, it chose to use VSP in a qualitative
18 manner as a conceptual framework, as recom-
19 mended by Lindley (2006). Although the analy-
20 sis in the BiOp may have benefited [sic] from
21 the application of quantitative VSP methodolo-
22 gies, it is disputed whether the failure to do
23 so represents a breach of accepted scientific
24 practice. A court must defer to the agency in
25 such scientific disputes.

26 The agency is not required to generate
27 new studies. For example, in *Southwest Center*
28 *for Biological Diversity v. Babbitt*, 215 F.3d
58, 60-612 (D.C. Cir. 2000), the district
court found the available evidence regarding
FWS's decision not to list the Queen Charlotte
goshawks "inconclusive" and held that the
agency was obligated to find better data on
the species' abundance. The D.C. Circuit
reversed, emphasizing that, although "the
district court's view has a superficial appeal
. . . this superficial appeal cannot circum-
vent the statute's clear wording: The secre-
tary must make his decision as to whether to
list a species as threatened or endangered

1 'solely on the basis of the best scientific
 2 and commercial data available to him. . . .'
 3 16 U.S.C. § 1533(b)(1)(A)." *Id.* at 61.
 4 Requiring NMFS to adapt the VSP methodology to
 operate as a quantitative model would be the
 equivalent of requiring NMFS to generate data.
 The court has no authority to do so.

5 *Id.*, 713 F. Supp. 2d at 1163-64.

6 The defendants argue the plaintiffs have failed to cite any
 7 scientific studies or methodology available to NMFS at the time it
 8 issued the BiOp that demonstrated "NMFS could have 'tracked' the
 9 various impacts discussed in prior biological opinions in a
 10 biologically meaningful manner that would have allowed the agency
 11 to conduct an alternative jeopardy analysis for the dredging
 12 project at issue." Dkt. #19, p. 20. They further assert that the
 13 "myriad impacts on salmonids often cannot be expressed in terms of
 14 a specific number of affected fish that could be easily 'tracked.'"
 15 *Id.* It is for this reason that NMFS uses surrogates to "perform
 16 the function of a numeric estimate by providing a 'trigger' for
 17 reinitiation of consultation, and NMFS 'articulate[s] a rational
 18 connection between the surrogate and the taking of the species.'"
 19 Dkt. #19, pp. 20-21 (quoting *Wild Fish Conservancy v. Salazar*, 628
 20 F.3d 513, 531 (9th Cir. 2010)).

21 The defendants also argue that NMFS's choice of methodology
 22 for assessing jeopardy "'is owed substantial deference'" under the
 23 law. Dkt. #19, p. 22 (quoting *Gifford Pinchot Task Force v. FWS*,
 24 378 F.3d 1059, 1066, 1067 (9th Cir. 2004))). In *Gifford*, the court
 25 held that "[f]ocus on actual species count is an overly narrow
 26 interpretation of what is required under the jeopardy prong." *Id.*,
 27 378 F.3d at 1067. The defendants assert that regardless of the
 28 plaintiffs' preference, "courts are not free to 'impose procedural

1 requirements that are [not] explicitly enumerated in the pertinent
 2 statutes." Dkt. #19, p. 22 (quoting *The Lands Council v. McNair*,
 3 537 F.3d 981, 993 (9th Cir. 2008) (noting the court is "to conduct
 4 a 'particularly deferential review' of an 'agency's predictive
 5 judgments about areas that are within the agency's field of
 6 discretion and expertise . . . as long as they are reasonable.'")
 7 (citations omitted).

8 The defendants disagree with the plaintiffs' contention that
 9 the ESA mandates their proposed approach, and they assert the
 10 *Oceana* case cited by the plaintiffs actually supports NMFS's
 11 position. Dkt. #19, pp. 22-23. Clarifying *Defenders of Wildlife*,
 12 the case upon which the plaintiffs rely, the *Oceana* court held that
 13 *Defenders of Wildlife* "'was not . . . imposing a requirement that
 14 each [BiOp] include a collective jeopardy finding, i.e., a
 15 determination whether all federal agency action, considered
 16 together, is likely to jeopardize the continued existence of [the
 17 species]'". Dkt. #19, p. 23 (quoting *Oceana*, 384 F. Supp. 2d at
 18 230) (internal quotation marks, citation omitted). The defendants
 19 instead rely on an unreported case from the Western District of
 20 Washington that was affirmed on appeal; i.e., *Northwest*
 21 *Environmental Advocates v. NMFS*, No. C04-0666RSM, 2005 WL 1427696,
 22 at *11 (W.D. Wash. June 15, 2005), *aff'd*, 460 F.3d 1125 (9th Cir.
 23 2006). In that case, the court rejected the plaintiff's argument
 24 that NMFS had failed to identify or analyze the environmental
 25 baseline adequately because NMFS did not "articulate 'the degree to
 26 which the estuary's current degraded conditions, when measured
 27 against the species' status, leave any 'room' to accommodate
 28 additional adverse impacts without causing jeopardy.'" *Id.* The

1 court held the plaintiff's argument was "misguided because nothing
 2 in the statute, regulations, or guidance requires such an express
 3 articulation." *Id.*

4 The defendants also reject the plaintiffs' contention that
 5 NMFS ignored short-term adverse impacts of the proposed action on
 6 the listed species, or that "NMFS failed to consider whether the
 7 project's impact on the factors limiting species recovery 'is
 8 likely to prevent or appreciably delay recovery of these ESUs.'" Dkt. #19, p. 24 (quoting Pl's brief, Dkt. #6, at 23). The defendants note the ESA only precludes federal actions that will "jeopardize the continued existence of" a threatened or endangered species, meaning the project "'reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild.'" Dkt. #19, pp. 24-25 (quoting 50 C.F.R. § 402.02 (emphasis added)). They note the preamble to the joint consultation regulations observes that "'[a]dverse effects may exist without constituting jeopardy,' . . . and 'adverse effects not rising to the level of jeopardizing the continued existence' of a listed species cannot be the basis for issuing a jeopardy opinion." Dkt. #19, p. 25 (quoting 51 Fed. Reg. at 19,950, 19,934-35; citing *Center for Marine Conserv. v. Brown*, 917 F. Supp. 1128, 1147 (S.D. Tex 1996); *Forest Guardians v. Veneman*, 392 F. Supp. 2d 1082, 1092 (D. Ariz. 2005) ("adverse effects were not inconsistent with 'no jeopardy' conclusion")).

26 The defendants argue the plaintiffs have not cited any of the
 27 project's potential effects that NMFS allegedly ignored, and they
 28 maintain NMFS conducted a thorough evaluation of all of the

1 project's potential effects, both short-term and long-term, in
2 formulating the BiOp. *Id.* The defendants argue NMFS did
3 everything it was required to do, including articulating a rational
4 connection with the facts found and the choices made, and
5 "[n]othing more is required under the deferential APA standard of
6 review." Dkt. #19, p. 26 (citing *Northwest Ecosystem Alliance v.*
7 *U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007)).

8 Turning to the lawfulness of the ITS, the defendants argue
9 NMFS's use of surrogates met all three of the requirements for the
10 use of surrogates to estimate the amount or extent of incidental
11 take. They assert that the use of surrogates is proper "if: (1) a
12 numerical take estimate cannot practicably be obtained; (2) the
13 surrogates perform the function of a numerical estimate by
14 providing an adequate trigger for reinitiating consultation; and
15 (3) NMFS 'articulate[s] a rational connection between the surrogate
16 and the taking of the species.'" Dkt. #19, pp. 26-27 (quoting *Wild
Fish Conservancy*, 628 F.3d at 531). They argue NMFS explained why
17 it could not determine a numerical estimate of take; it "articu-
18 lated a rational connection between the surrogates and the
19 anticipated take"; and the surrogates used "provide clear triggers
20 for reinitiating consultation." Dkt. #19, p. 27. They conclude
21 that "[w]hile the surrogate triggers reflect the anticipated
22 impacts of the project, this fact alone 'should not render them
23 defective.'" Dkt. #19, p. 28 (quoting *NEDC*, 647 F. Supp. 2d at
24 1239).

25
26 The defendants further assert that the Corps' reliance on the
27 BiOp was rational; indeed, the Corps "conducted its own assessment
28

1 and rationally concluded that the project would have no significant
 2 impact on listed species." Dkt. #19, p. 28.

3 For all these reasons, the defendants argue that the
 4 plaintiffs have failed to show they are likely to succeed on the
 5 merits in this case, or to raise "serious questions" going to the
 6 merits. *Id.*

7

8 ***C. The Intervenor's arguments***

9 As expected, the intervenor's arguments are substantially
 10 similar to the defendants', and the court will not duplicate
 11 discussion of the same arguments raised by the defendants. The
 12 intervenor does, however, raise some additional points.

13 First, the intervenor notes that the plaintiffs' argument in
 14 favor of a "running tally" of incidental take already has been
 15 flatly rejected by this court in *NEDC*. The plaintiffs in *NEDC* also
 16 used the "bank account" analogy, and argued NMFS had failed to take
 17 action to determine the "'current balance' of the take bank
 18 account, or whether a new project would 'overdraw the account.'" Dkt. #14, pp. 16-17 (quoting *NEDC*, 647 F. Supp. 2d at 1237). The
 20 *NEDC* court held:

21 "[T]he ESA does not prescribe how the
 22 jeopardy prong is to be determined." *Gifford*
Pinchot, 378 F.3d at 1067. NMFS acted reasonably
 23 in this case. Current levels of take
 cannot be categorized numerically and the VSP
 24 are an appropriate scientifically based proxy.
 Based on the abundant information in the BiOp
 about the current state of each of the listed
 25 species and the state of the critical habitat,
 NMFS knows "roughly at what point survival and
 26 recovery will be placed at risk." *Nat'l*
Wildlife Fed'n, 524 F.3d at 936. Thus, NMFS's
 27 determination of no jeopardy was not arbitrary
 and capricious due to a failure to account for
 28 the current level of take in the Willamette.

1 *NEDC*, 647 F. Supp. 2d at 1238. The intervenor argues the
 2 plaintiffs' position in the present case fails for the same reasons
 3 articulated by the *NEDC* court. Dkt. #14, p. 17.

4 The intervenor further argues the plaintiff's "running tally
 5 argument . . . fundamentally makes no sense" because it "is
 6 premised on two misconceptions: (1) one 'take' equals one dead or
 7 seriously injured fish; and (2) only a finite amount of take is
 8 available." Dkt. #14, p. 19. The intervenor asserts neither of
 9 these conceptions is accurate, pointing to the definition of "take"
 10 in the regulation, 16 U.S.C. § 1532 (19). *Id.* (noting that "Take"
 11 under the ESA does not equal "mortality."); see p. 9, *supra*.
 12 Thus, the intervenor asserts, "Take could be as severe as death, as
 13 minor as a momentary harassment, or as ephemeral as an 'attempt to
 14 engage in any such conduct.'" Dkt. #14, p. 19 (quoting 16 U.S.C.
 15 § 1532(19)).

16 The intervenor argues the plaintiffs' reliance on *Defenders of*
 17 *Wildlife* is inapposite. According to the intervenor, the same
 18 court later clarified that it had never held a BiOp must add all
 19 prior takes, and "a biological opinion could be legally valid 'even
 20 though it does not numerically add the takes from different sources
 21 together.'" Dkt. #14, p. 20 (quoting *Oceana*, 384 F. Supp. 2d at
 22 230).¹⁰ The intervenor argues the plaintiffs are attempting to
 23 require NMFS to use an "actual species count," a requirement that
 24 has been rejected by the Ninth Circuit. Dkt. #14, pp. 20-21
 25 (citing *Gifford Pinchot*, 378 F.3d at 1067). The intervenor claims
 26
 27

28 ¹⁰I discuss the *Oceana* case in more detail in section VII.E.,
infra.

1 the plaintiffs' methodology argument fails in light of NMFS's use
2 of VSP methodology to evaluate jeopardy. Dkt. #14, p. 23.

3 Regarding the ITS, the intervenor argues NMFS's use of
4 surrogates to establish triggers to the reinitiation of
5 consultation was both proper and sanctioned by the courts. The
6 intervenor notes a surrogate "must contain 'measurable guidelines'
7 and 'must not be so general that the applicant or the action agency
8 cannot gauge its level of compliance.'" Dkt. #14, p. 26 (quoting
9 *ONRC*, 476 F.3d at 1038)). The intervenor argues the ITS in this
10 case meets those requirements by NMFS's selection of two surrogate
11 triggers, either of which, if exceeded, will require reinitiation
12 of consultation. "The first trigger is the one-month duration of
13 the project; if the project lasts longer than one month, then the
14 suspended sediments will increase beyond those anticipated, and
15 reinitiation is necessary. [BiOp at 22.] The second trigger is a
16 turbidity level of 5 NTU over background as measured 500 feet from
17 the dredging area; if that level is exceeded, then the project is
18 having a greater impact than anticipated, and a reinitiation is
19 therefore necessary." Dkt. #14, pp. 26-27.

20 The intervenor rejects the plaintiffs' argument that these
21 surrogates are "coextensive with the project's own scope," as was
22 the case in *ONRC*. See *ONRC*, 476 F.3d at 1039; Dkt. #14, p. 27.
23 Instead, the intervenor notes the scope of the proposed dredging
24 project is removal of "45,000 cubic yards from the Willamette River
25 to restore the channel's 40-foot navigation depth at RM 2.1-2.4,
26 which is 30,000 cubic yards less than the scope and impact analyzed
27 / / /
28 / / /

1 in the Post office Bar BiOp.”¹¹ Dkt. #14, p. 27 (citation omitted).
 2 According to the intervenor, the two surrogate factors “are not the
 3 ‘scope’ of the project[,] but rather are mitigation and monitoring
 4 measures designed to limit the amount of take,” *id.*, and if they
 5 are exceeded, then the ITS requires reinitiation of consultation.
 6 *Id.*, pp. 26-27. That is to say, for example, that the scope of the
 7 project was not to generate turbidity of 5 NTU over background.
 8 The intervenor further notes that the *NEDC* court distinguished *ONRC*
 9 and rejected almost identical arguments offered by the plaintiffs
 10 in that case. *Id.*, p. 28.

11

12 **D. The plaintiffs' reply**

13 The plaintiffs first assert they are not attempting to change
 14 the way NMFS implements the ESA, as argued by the defendants and
 15 the intervenor, nor are they seeking to impose “a new and novel
 16 methodology” upon the agency. Dkt. #23, p. 1. The plaintiffs
 17 state they do not “take issue with NMFS’ [s] scientific judgment;
 18 rather, Plaintiffs maintain that NMFS did not follow the law and
 19 the agency’s own policies in preparing the Post Office Bar BiOp.”
 20 *Id.*, p. 2. The plaintiffs state their analogy of a bank account
 21 that becomes overdrawn, or the final straw that breaks a camel’s
 22

23

24 ¹¹The project’s scope initially was to remove 75,000 cubic
 25 yards of sediment from the river. One of the surrogates utilized
 26 by NMFS to define the amount or extent of incidental take is
 27 limiting the time frame of the project to thirty days; if the
 28 project exceeds thirty days, that will trigger reinitiation of
 understanding that the Corps has decided to limit dredging to
 thirty days, during which only about 45,000 cubic feet will be able
 to be removed.

1 back, simply illustrated the type of analysis required by ESA
2 section 7 and its accompanying regulations and policies.

3 The plaintiffs acknowledge that incremental adverse impacts on
4 listed species or designated critical habitat are allowed under
5 section 7, but they argue such impacts are allowed only until "the
6 total impacts reach a point where a proposal for yet more impacts
7 must be halted because 'the action effects, when added to the
8 underlying baseline conditions, would tip the species into jeopardy
9 [or adverse modification of critical habitat]." Dkt. #23, p. 3
10 (quoting *National Wildlife Fed. v. NMFS*, 524 F.3d 917, 929 (9th
11 Cir. 2008)). Thus, the plaintiffs argue, NMFS rationally cannot
12 "assess whether or not a project with adverse effects to species
13 and/or critical habitat can proceed" without first "knowing how
14 close a species or its critical habitat is to the jeopardy/adverse
15 modification lines[.]" Dkt. #23, p. 4.

16 The plaintiffs point to NMFS's representation, in 2000, when
17 the agency "adopted rules governing take of four of the five ESUs
18 affected by the Post Office Bar project," that it "'intend[ed] to
19 work with co-managers to develop the necessary standards and
20 assessment techniques'" and it was "'moving toward implementing a
21 method for assessing total take across broad sectors.'" Dkt. #23,
22 p. 6 (quoting 65 Fed. Reg. 42422-01, 42440 (2000)). The plaintiffs
23 argue that NMFS and its co-managers have failed to develop these
24 "standards and assessment techniques" despite the passage of more
25 than a decade since NMFS made this representation.

26 The plaintiffs also argue the VSP criteria, standing alone,
27 are inadequate to comply with the analyses required by section 7.
28 The plaintiffs argue "[t]he concept of a 'viable population'

1 focuses on the likelihood that a salmonid population will persist
2 over 100 years, and does not attempt to set forth criteria to
3 assess habitat condition or impacts." Dkt. #23, p. 7 (citation
4 omitted). The plaintiffs assert that although the VSP criteria are
5 useful as "a generic framework . . . in assessing risk to salmon
6 populations," even NMFS has noted that application of the VSP
7 criteria "'will require population- and ESU-specific evaluations.
8 This will not be very satisfying to managers looking to VSP for
9 "the answer," but is the only scientifically sound course at this
10 time.'" Dkt. #23, p. 8 (quoting 65 Fed. Reg. at 42430).

11 The plaintiffs further argue the McElhany 2007 report upon
12 which the defendants rely supports the plaintiffs' position that
13 "'[a] current status evaluation . . . is concerned with providing
14 an accurate view of where a population is at a given time and
15 should utilize all available information.'" Dkt. #23, p. 9
16 (quoting McElhany 2007 at 4) (emphasis in original). The
17 plaintiffs maintain the Consultation Handbook similarly requires
18 that a jeopardy analysis include an assessment of 'the aggregate
19 effects of everything that has led to the species' current status
20 and, for non-Federal activities, those things likely to affect the
21 species in the future.'" *Id.* (quoting Consultation Handbook at
22 4-35).

23 The plaintiffs take issue with the defendants' representation
24 that NMFS only needs to update information on the ESUs' current
25 status when "'new information is developed indicating that the
26 status of the species has changed.'" Dkt. #23, p. 10 (quoting Dkt.
27 Dkt. #19, p. 16). The plaintiffs assert that obviously, NMFS
28 cannot "develop information indicating that species' status has

1 changed if it has no intent or means of tracking incremental
 2 impacts to these species over time." *Id.*

3 The plaintiffs also claim the McElhany 2007 report was updated
 4 in 2009, to determine that the risk of extinction of upper
 5 Willamette River Chinook has degraded from "high" to "very high,"
 6 and that of the UWR steelhead actually had improved from "moderate"
 7 to "low." The plaintiffs observe that NMFS was a part of the
 8 "recovery team" that issued a draft recovery plan for Willamette
 9 River ESUs in October 2010, which cited the 2009 update, but
 10 nevertheless, NMFS used the 2007 extinction risks in the 2010 BiOp
 11 instead of the updated risks, and continues to insert boilerplate
 12 language regarding the species' "current status." Dkt. #23,
 13 p. 12.¹²

14 Further, the plaintiffs argue the "VSP criteria were designed
 15 solely to determine viability of salmonid populations, not to
 16 evaluate salmon habitat." *Id.* They argue NMFS "virtually
 17 ignor[ed] critical habitat" in their evaluation of the proposed
 18 dredging project. *Id.*, pp. 12-13. As with the jeopardy analysis
 19 of the species, the plaintiffs argue NMFS erred in failing to
 20 consider its previous BiOps detailing those projects' impacts on
 21 critical habitat. *Id.*, p. 13. The plaintiffs further reiterate
 22 their argument that NMFS failed to use the best science available
 23 by failing to consider all the available evidence relating to
 24

25
 26 ¹²At oral argument, the Defendants stated there was no 2009
 27 "update" to McElhany 2007. Rather, there was a proposed revision
 28 that appeared in the draft recovery plan. No such revision to the
 McElhany report has been adopted.

1 implementation and effectiveness of the RPA set forth in the 2008
 2 Jeopardy BiOp. *Id.*, pp. 13-16.

3 Regarding the defendants' argument that NMFS did, in fact,
 4 consider the short-term impacts to the listed ESUs and their
 5 critical habitat, the plaintiffs observe that although the
 6 defendants and the intervenor "argue strenuously that NMFS
 7 evaluated the short term impacts to listed species and critical
 8 habitat and found them acceptable, they never point to actual
 9 language in the BiOp supporting this finding." *Id.*, p. 16
 10 (citations omitted).

11

12 ***E. Discussion***

13 The court first notes that the plaintiffs rely on *Defenders of*
 14 *Wildlife* for the proposition that a BiOp must include an analysis
 15 of previous agency actions on the endangered species. The
 16 defendants and intervenor argue *Oceana* effectively negated
 17 *Defenders of Wildlife* by "clarifying" that a BiOp can be legally
 18 valid "even though it does not numerically add the takes from
 19 different sources together." *Oceana*, 384 F. Supp. 2d at 230. It
 20 is instructive to examine what the *Oceana* court held in more detail
 21 to place the parties' arguments in proper context.

22 In *Defenders [of Wildlife]*, the Court held
 23 that "[t]he impact of an authorized incidental
 24 take cannot be determined or analyzed in a
 25 vacuum, but must necessarily be addressed in
 26 the context of other incidental take author-
 27 ized by FWS. . . . The [BiOp] must also
 28 include an analysis of the effects of the
 action on the species when 'added to' the
 environmental baseline - in other words, an
 analysis of the *total* impact on the species."
 130 F. Supp. 2d at 127-28 (quoting 50 C.F.R.
 § 402.02) (emphasis in original). Because FWS
 had merely listed the other activities

1 affecting the pronghorns without making them
 2 part of its analysis, the Court found the
 3 [BiOp] to be inadequate. When the agencies
 4 issued new [BiOps] on remand, the plaintiffs
 5 moved to enforce the Court's order, claiming
 6 that the [BiOps] were still inadequate.
 7 *Defenders of Wildlife v. Norton*, 2003 WL
 8 24122459 (D.D.C. Jan. 7, 2003) (hereinafter
 9 "Defenders II"). In this second round, the
 10 Court clarified that a [BiOp] is adequate if
 11 it "takes the baseline seriously and makes a
 12 concerted effort to evaluate the impact of
 13 [the agency's] proposed action against that
 14 backdrop." *Id.* at *4. *Defenders [of Wild-*
 15 *life]* . . . was not . . . imposing a require-
 16 ment that each [BiOp] include a collective
 17 jeopardy finding, i.e., a determination
 18 whether all federal agency action, considered
 19 together, is likely to jeopardize the con-
 20 tinued existence of [the species]." *Id.* at *5
 21 (emphasis in original). The Court concluded
 22 that the [BiOp] issued on behalf of the BLM
 23 was sufficient because it set out the take
 24 anticipated for nine other agency actions,
 25 considered the potential effects of the
 26 proposed BLM action, and specifically acknowl-
 27 edged that the BLM's actions needed to be
 28 evaluated in the context of an environmental
 29 baseline showing that Sonoran pronghorns were
 30 in "immediate danger of extirpation." *Id.*
 31 at *4.

32 *Oceana*, 384 F. Supp. 2d at 230. Thus, although the *Oceana* court
 33 held a BiOp need not "numerically add the takes from different
 34 sources together," *id.*, it held an agency is required to evaluate
 35 a proposed action "in light of the environmental baseline," which,
 36 by definition, must include consideration of the effects of other
 37 agency actions and the current status of the ESUs at issue. See
 38 *id.*; 50 C.F.R. § 402.14(g)(3) (the agency must "[e]valuate the
 39 effects of the action and cumulative effects on the listed species
 40 or critical habitat").

41 The defendants are correct that "[f]ocus on actual species
 42 count is an overly narrow interpretation of what is required under
 43 the jeopardy prong." *Gifford Pinchot*, 378 F.3d at 1067. Rather,

1 a jeopardy analysis may be based on "a habitat proxy," *id.*, (i.e.,
2 "predicting species jeopardy based on habitat degradation," *id.*,
3 378 F.3d at 1066); and ecological conditions may be used "as a
4 surrogate for defining the amount or extent of incidental take
5 . . . so long as these conditions are linked to the take of the
6 protected species." *Arizona Cattle Growers Ass'n*, 273 F.3d at 1250
7 (internal quotation marks omitted). Here, NMFS analyzed the status
8 of the listed salmonids using the VSP criteria (i.e., abundance,
9 productivity, spatial structure, and genetic diversity). This
10 court has held previously that "the VSP are an appropriate
11 scientifically based proxy." *NEDC*, 647 F. Supp. 2d at 1238 (quoted
12 in context *supra*, p. 50).

13 The court rejects the plaintiffs' argument that the surrogates
14 NMFS employed in this case are "coextensive with the project's own
15 scope" because NMFS did not link the surrogates to actual numbers
16 of incidental take. See Dkt. #26, pp. 25-26. Use of a surrogate
17 only comes into play when the agency is *unable* to determine the
18 actual numbers of take. Arguing a surrogate cannot be used unless
19 it is linked to actual numbers of incidental take, when the only
20 time surrogates are used is when actual numbers are unavailable, is
21 circular reasoning.

22 The key to the plaintiffs' case is the statutory language
23 itself. The applicable statute requires that after consultation,

24 the Secretary shall provide to the Federal
25 agency and the applicant, if any, a written
26 statement setting forth [1] the Secretary's
27 opinion, and [2] a summary of the information
28 on which the opinion is based, detailing how
the agency action affects the species or its
critical habitat. If jeopardy or adverse
modification is found, the Secretary shall
suggest those reasonable and prudent alterna-

tives which he believes would not violate subsection (a) (2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

16 U.S.C. § 1536(b)(3). Thus, the Secretary is charged with setting forth an opinion, and a summary of the information upon which the opinion is based. The law does not specify the particular methodology NMFS must use. Moreover, the plaintiffs have failed to cite a single scientific study NMFS failed to consider, or to provide a single expert opinion of their own concluding the proposed dredging action would jeopardize the ESUs or their critical habitat, either within the defined action area or on a broader scale.

The court recognizes that a different methodology is needed in order to allow NMFS and other federal agencies to provide more accurate opinions regarding the current status of threatened and endangered species and critical habitat. However, the court is not free to rewrite the statute to include additional requirements such as the development of new methodologies or new data. Further, the "agency's scientific methodology is owed substantial deference[.]" *Gifford Pinchot*, 378 F.3d at 1066 (citing *United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 213 (9th Cir. 1989)).

The court finds the plaintiffs have failed to meet their burden to show either a likelihood of success on the merits, or the existence of substantial questions going to the merits.

VIII. IRREPARABLE HARM

In order to obtain a preliminary injunction, the plaintiffs also "must establish that irreparable harm is likely, not just

1 possible." *Frankl v. HTH Corp.*, ____ F.3d ____, 2011 WL 2725812 (9th
 2 Cir. July 13, 2011) (citing *Alliance for the Wild Rockies v.*
 3 *Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)). There is
 4 "considerable overlap" between the "irreparable harm" prong of the
 5 preliminary injunction standard and the "likelihood of success on
 6 the merits" or "serious question" prong. *Earth Island Institute v.*
 7 *Carlton*, 626 F.3d 462, 474 (9th Cir. 2010).

8 Thus, in Ninth Circuit ESA cases, the general "'test for
 9 determining if equitable relief is appropriate is whether an
 10 injunction is necessary to effectuate the congressional purpose
 11 behind the statute.'" *Pacific Coast Fed. of Fisherman's Ass'ns v.*
 12 *Gutierrez*, 606 F. Supp. 2d 1195, 1203 (E.D. Cal. 2008) (quoting
 13 *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir.
 14 2002)). The *Pacific Coast* court observed that "[t]here is
 15 considerable disagreement and confusion about what should be
 16 considered 'irreparable harm' for purposes of . . . injunctive
 17 relief proceedings. The Ninth Circuit has not articulated a
 18 standard or threshold at or above which ESA 'harm' is considered
 19 'irreparable.'" *Pacific Coast*, 606 F. Supp. 2d at 1207 (footnote
 20 omitted). However, "[a] court need not wait until the species is
 21 immediately threatened with extirpation to issue injunc-
 22 tive relief." *Id.* (citing *American Rivers v. U.S. Army Corps of*
 23 *Eng'rs*, 271 F. Supp. 2d 230, 258-69 (D.D.C. 2003) "(injunction may
 24 issue if the number of individuals likely to be taken as a result
 25 of agency action during the time it will take to conclude the
 26 litigation will cause 'significant' harm to the species, even if
 27 there is 'not the remotest possibility that the planned agency
 28 activity . . . would eradicate the species')"; *Swan View Coal, Inc.*

1 v. Turner, 824 F. Supp. 923, 938 (D. Mont. 1992) "(threatened
 2 extinction not necessary for a finding of harm under the ESA)".¹³

3 The plaintiffs argue they have shown a likelihood of
 4 irreparable harm, pointing to the BiOp's finding that the dredging
 5 project will have adverse effects on five of the listed species and
 6 their critical habitat, "as well as kill or injure an indefinite
 7 number of juvenile members of these species." Dkt. #6, p. 27
 8 (citing BiOp at 14, 20). They argue this finding alone is
 9 sufficient under Tennessee Valley Authority to tip the balance in
 10 favor of issuing a preliminary injunction. They further assert
 11 that a strong public interest exists "'in preserving nature and
 12 avoiding irreparable environmental injury.'" Dkt. #6, p. 29
 13 (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
 14 1130 (9th Cir. 2011)) (citation omitted). They argue that any
 15 delay in the dredging project and its "potential limits to
 16 navigation due to the delay cannot outweigh ensuring the continued
 17 existence of listed salmon and steelhead ESUs." Dkt. #6, p. 31.

18 The defendants argue the plaintiffs "cannot spend 26 pages
 19 attacking the BiOp as arbitrary and illegal - and then turn around
 20 and rely on the same BiOp to try to meet their burden of
 21 demonstrating irreparable harm." Dkt. #19, p. 29. The defendants
 22 cite *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531,
 23 545, 107 S. Ct. 1396, 1404, 94 L. Ed. 2d 542 (1987), for the

24
 25 ¹³Should the court ultimately conclude the defendants have
 26 violated the ESA, the burden would be on the defendants to prove
 27 the proposed action is non-jeopardizing. *Washington Toxics*
Coalition v. E.P.A., 413 F.3d 1024, 1035 (9th Cir. 2005). However,
 28 the court does not so find at this stage of the proceedings.
 Accordingly, the burden remains on the plaintiffs to show a
 likelihood of irreparable harm.

1 proposition that "[h]arm is irreparable if it is 'permanent or of
 2 long duration.'" *Id.* (quoting *Village of Gambell*). However, the
 3 Court in *Village of Gambell* did not define the term "harm" in those
 4 terms. In *dicta*, the Court noted:

5 [The district court held] that "[i]rreparable
 6 damage is *presumed* when an agency fails to
 7 evaluate thoroughly the environmental impact
 8 of a proposed action." [Citation omitted.]
 9 This presumption is contrary to traditional
 10 equitable principles and has no basis in [the
 11 Alaska National Interest Lands Conservation
 12 Act]. Moreover, the environment can be fully
 13 protected without this presumption. Environmental
 14 injury, by its nature, can seldom be
 15 adequately remedied by money damages and is
 16 often permanent or at least of long duration,
 17 i.e., irreparable. If such injury is suffi-
 18 ciently likely, therefore, the balance of
 19 harms will usually favor the issuance of an
 20 injunction to protect the environment.
 21

22 *Village of Gambell*, 480 U.S. at 544-45, 107 S. Ct. at 1404.

23 The defendants further argue the plaintiffs' contention that
 24 "any adverse impact on a listed species - no matter how minor or
 25 temporary - constitutes irreparable harm . . . fails as a matter of
 26 law." Dkt. #19, p. 29 (citing Dkt. #6, p. 28). The defendants
 27 argue the plaintiffs must show the proposed action would
 28 "jeopardize the continued existence of the species as a whole." Dkt. #19, p. 30 (emphasis in original). The defendants note the plaintiffs, themselves, acknowledge that the ESA "'does not prohibit all negative impacts on listed salmon and steelhead or their critical habitat; rather, it only prohibits agency actions that have the effect of jeopardizing an entire listed ESU or adversely modifying the conservation value of an entire critical habitat designation.'" *Id.* (quoting Dkt. #6, p. 3; citing *id.*, p. 18).

1 The defendants argue the plaintiffs' assertion that the
2 project's "minor adverse effects . . . 'could prove disastrous'
3 . . . is precisely the kind of speculative allegation of possible
4 harm that cannot, after *Winter*, support the issuance of an
5 injunction." *Id.* They argue the plaintiffs have failed to show
6 that irreparable harm is not only possible, it is *likely*, and
7 therefore the plaintiffs' request for injunctive relief should be
8 denied. *Id.*

9 The intervenor notes the plaintiffs have "concede[d] that
10 standing alone the 'adverse impacts to the designated critical
11 habitat' caused by the project are 'relatively modest.'" Dkt. #14,
12 p. 29 (quoting Dkt. #6, p. 1). The intervenor argues the
13 plaintiffs have ignored the ultimate finding in the BiOp that the
14 proposed project "will not affect the abundance, productivity, and
15 distribution of genetic diversity of any of the affected
16 populations of the species. Therefore, it will not appreciably
17 reduce the likelihood of survival and recovery of any of the listed
18 species.'" *Id.* (quoting BiOp at 20). The intervenor further
19 faults the plaintiffs for failing to offer an expert opinion or
20 other evidence to challenge NMFS's conclusions set forth in the
21 BiOp, instead proffering "only unsubstantiated and conclusory
22 allegations of harm." *Id.*

23 In reply, the plaintiffs first attack the defendants' reliance
24 on the District of Montana case, *Defenders of Wildlife v. Salazar*,
25 "for the proposition that harm to the species justifying an
26 injunction must be 'significant' to the overall population." Dkt.
27 #23, p. 18 (quoting Dkt. #19, p. 29). The plaintiffs assert,
28 "This is a higher standard than imposed by many other courts." *Id.*

1 They cite three federal district court cases from the District of
 2 Columbia, one case from the District of Columbia Circuit, and one
 3 Ninth Circuit case in support of this proposition. See *id.* (citing
 4 *inter alia*, *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1067-68 (9th
 5 Cir. 1996) "(finding sufficient showing of harm to warrant
 6 permanent injunction against logging 237-acre forest tract that
 7 yielded 100 detections of murrelets from a listed three-state
 8 population estimated at 18,000 birds)." *Id.*

9 The plaintiffs return to their original argument that the BiOp
 10 itself is the best evidence of irreparable harm, where it indicates
 11 lower Columbia Chinook are at a "high risk" of extinction, and
 12 their population is in the "extirpated or nearly so" abundance
 13 category. *Id.* (citing BiOp at 6). They further note the BiOp's
 14 citation of the McElhany 2007 finding that "'[f]urther habitat
 15 changes in the Willamette River . . . would likely have a
 16 significant effect on fall Chinook salmon.'" *Id.* (quoting BiOp
 17 at 6). They also again note the purportedly increased risk of
 18 extinction of the upper Willamette Chinook salmon from "high" in
 19 2007, to "very high" in 2009. Dkt. #23, p. 19. The plaintiffs
 20 close by observing that because NMFS has no way of determining the
 21 current, cumulative status of the ESUs based on the incremental
 22 impact of repeated incidental take authorizations, the actual
 23 status of the listed ESUs may be even more dire than reflected in
 24 the BiOp. *Id.*

25 In *Winter*, the Supreme Court made it clear that a plaintiff
 26 seeking injunctive relief must show more than "a possibility of
 27 irreparable harm." The Court held, "Issuing a preliminary
 28 injunction based only on a possibility of irreparable harm is

1 inconsistent with our characterization of injunctive relief as an
2 extraordinary remedy that may only be awarded upon a clear showing
3 that the plaintiff is entitled to such relief." *Winter*, 129 S. Ct.
4 at 375-76 (citing *Mazurek v. Armstrong*, 530 U.S. 978, 972, 117
5 S. Ct. 1865, 138 L. Ed. 2d 162 (1997) (*per curiam*)); see *Earth*
6 *Island Inst.*, 351 F.3d at 1211 ("[T]he moving party must
7 demonstrate a significant threat of irreparable injury, irrespec-
8 tive of the magnitude of the injury.") (citations omitted).

9 Here, the plaintiffs have offered no more than speculation
10 that irreparable harm will occur if an injunction is not issued.
11 They have offered no scientific studies or expert opinions in
12 support of their position. They argue NMFS should quantify its own
13 ITSSs issued over the past several years, without pointing to
14 particular information in those ITSSs that shows NMFS authorized
15 cumulative incidental takes that actually placed the affected
16 species in jeopardy. Merely saying the prior BiOps and ITSSs are
17 the "best science" regarding the status of the ESUs and critical
18 habitat is not enough. The plaintiffs have failed to point to the
19 information contained within those documents that they contend
20 proves the listed ESUs are in jeopardy.

21 The court finds the plaintiffs have failed to prove that
22 irreparable harm is likely to result if an injunction is not
23 issued.

24

25 **CONCLUSION**

26 Because the plaintiffs have failed to show either a likelihood
27 of success on the merits or substantial questions going to the
28

1 merits, and a likelihood of irreparable harm, their motion for a
2 preliminary injunction is **denied**.

3 IT IS SO ORDERED.

4 Dated this 29th day of July,
5 2011.

6 /s/ Dennis J. Hubel
7

8 Dennis James Hubel
9 United States Magistrate Judge